

6-1-2001

We're All Winners: Game Theory, The Adjusted Winner Procedure and Property Division at Divorce

Jeremy A. Matz

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/blr>

Recommended Citation

Jeremy A. Matz, *We're All Winners: Game Theory, The Adjusted Winner Procedure and Property Division at Divorce*, 66 Brook. L. Rev. 1339 (2001).

Available at: <https://brooklynworks.brooklaw.edu/blr/vol66/iss4/11>

This Note is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Brooklyn Law Review by an authorized editor of BrooklynWorks.

WE'RE ALL WINNERS: GAME THEORY, THE ADJUSTED WINNER PROCEDURE AND PROPERTY DIVISION AT DIVORCE

INTRODUCTION

It has been estimated that close to half of all current marriages will end in divorce.¹ Before the divorce reform movement in the 1960s, there were two rule systems to divide property in a divorce.² The first scheme, called the separate property system, divided property based on who was the title holder.³ The second scheme, called community property, with few exceptions,⁴ evenly divided all property acquired after the date of the marriage between the couple.⁵ Since the 1960s

¹ See Carol B. Liebman, *A Theoretical Basis for Divorce Negotiation*, in NEGOTIATING TO SETTLEMENT IN DIVORCE 1, 1 (Sanford N. Katz ed. 1987); see also Marsha Garrison, *How Do Judges Decide Divorce Cases? An Empirical Analysis of Discretionary Decision Making*, 74 N.C. L. REV. 401, 405-06 (1996) ("Americans today are more likely to experience divorce than any other type of civil litigation.") [hereinafter Garrison(1)].

² See Deborah H. Bell, *Equitable Distribution: Implementing the Marital Partnership Theory Through the Dual Classification System*, 67 MISS. L.J. 115, 117 (1997) ("[u]ntil the last half-century, courts divided property between divorcing spouses under either of two very different marital property systems," the title system and the community property system); see also *infra* note 6.

³ See HOMER H. CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 177 (2d ed. 1987) (finding in separate property states, "each spouse owns the property standing in his name"); Bell, *supra* note 2, at 117 ("the title system . . . required that courts award property to the spouse who held title to the property during marriage.").

⁴ See N.Y. DOM. REL. LAW § 236B(1) (McKinney 1986 & Supp. 1999) (keeping premarital property, gifts, inheritances, and personal injury awards separate from marital property for purposes of marital property division in divorce); Bell, *supra* note 2, at 121 (recognizing that community property schemes considered "property acquired through gift or inheritance, or owned prior to the marriage, [was] the separate property of the individual spouse," exempt from division as marital property).

⁵ See CLARK, *supra* note 3, at 177 (finding that in the community property states, "each spouse has an existing interest in the assets of the" marriage); Bell, *supra* note 2, at 121 ("[r]egardless of how title is held, each spouse owns one-half of all

attempts have been made to improve the divorce process and the substance of the resulting agreement.⁶ To avoid the potential unfairness under the old rules, legislatures developed new property distribution rules.⁷ Equitable distribution rules fall into this category.⁸ To improve the divorce process, the divorcing couple was given greater control and flexibility to privately divide marital rights and responsibilities.⁹ To verify that a privately negotiated divorce is equitable, the court must still approve any agreement the parties reach.

Even though the legislature created new rules for judges to follow when dividing marital property, these rules only incidentally affect most couples because the rules do not

marital property," which includes all income earned by the spouses and property purchased with those earnings).

⁶ See Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1470 (1992) ("Until the late 1960s, American law recognized no such thing as a consensual or privately ordered divorce."). Prior to divorce reform in the 1960s, divorce was granted only if one party was at fault. Procedurally this required one party to become a plaintiff and accuse the other party of some form of wrongdoing. This procedure was modified with the introduction of no-fault divorce. See June Carbone & Margaret F. Brinig, *Rethinking Marriage: Feminist Ideology, Economic Change, and Divorce Reform*, 65 TUL. L. REV. 953, 958 (1991). Presently no pure fault based divorce jurisdictions remain. Removing fault from divorce led to new standards for crafting divorce agreements. See *id.* at 960-61; Garrison(1), *supra* note 1, at 403 ("Instead of bright-line rules, legislatures have typically given judges in the divorce court almost unlimited discretion, bounded only by indeterminate standards or lists of factors that may be considered.").

⁷ See Bell, *supra* note 2, at 121 (finding that in response to concerns over the inequity in the old common law property division scheme, legislatures began enacting statutes granting the wife increased property rights); Suzanne Reynolds, *The Relationship of Property Division and Alimony: The Division of Property to Address Need*, 56 FORDHAM L. REV. 827, 837-39 (finding that the divorce reform movement, motivated partially by inadequate alimony awards, recognized "more explicitly" the need for property distribution to provide support); Garrison(1), *supra* note 1. For an example of an inequitable divorce agreement resulting from application for common law property division rules see *Wirth v. Wirth*, 38 A.D.2d 611, 326 N.Y.S.2d 308 (App. Div., 3d Dept. 1971).

⁸ Equitable distribution is the name given a type of divorce law which grants the judge discretion to divide the marital property. The statutes usually require the judge to consider a specific list of factors when making the decision. See, e.g., N.Y. DOM. REL. LAW § 236B(6)(a) (McKinney 1986 & Supp. 1999) (requiring courts to consider thirteen factors, ranging from the duration of the marriage to the tax consequences for each party, when deciding how to divide the marital property at divorce).

⁹ See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 953 (1979) ("The no-fault revolution has made divorce largely a matter of private concern.").

control private bargaining.¹⁰ Compared to the equitable distribution rules, the legislature has not provided couples with similar guidance for dividing their assets, liabilities, and child-rearing responsibilities through private bargaining.¹¹ While a judicial decree is always necessary, in most cases the decree merely "rubber stamps" the agreement the two parties privately negotiated.¹² Since most divorces are resolved through private bargaining, couples would benefit from assistance in the negotiation process.¹³ To preserve the couple's control over the process, guidance should not dictate results, but rather prevent an unfair result. If a divorcing couple reaches a settlement they agree is fair, less court time will be needed to resolve disputed issues.¹⁴

This Note reviews a procedure, called Adjusted Winner,¹⁵ developed by Steven J. Brams¹⁶ and Alan D. Taylor,¹⁷ that they claim will facilitate negotiations between a divorcing

¹⁰ It has been estimated that less than ten percent of divorces require adjudication. See Mnookin & Kornhauser, *supra* note 9, at 951 n.3. Since equitable distribution regulates how judges should distribute marital property, the statutes only indirectly impact divorcing couples. See *id.* at 950 (finding that divorce law provides some framework within which divorcing couples can privately determine the distribution of rights and responsibilities).

¹¹ See *id.* at 969 ("[E]xisting legal standards governing custody, alimony, child support, and marital property are all striking for their lack of precision and thus provide a bargaining backdrop clouded by uncertainty.").

¹² *Id.* at 951. Mnookin and Kornhauser claim that in the United States as well as England, most couples are able to resolve their distributional concerns without a judicial resolution. See *id.*

¹³ See Mnookin & Kornhauser, *supra* note 9, at 957 ("[p]arties should be encouraged to settle [economic issues themselves]"). Because the law was created, not with bargaining in mind, but with regard to adjudication, they suggest it would be better if the law was used to encourage private settlement of economic issues by providing for "efficient and fair mechanisms for enforcing such agreements and for settling disputes when the parties are unable to agree." *Id.*

¹⁴ It is this envy between parties at divorce that the Adjusted Winner was designed to rectify, without sacrificing efficiency. See STEVEN J. BRAMS & ALAN D. TAYLOR, FAIR DIVISION: FROM CAKE-CUTTING TO DISPUTE RESOLUTION 67 (1996) (claiming that Adjusted Winner simultaneously delivers three benefits: envy-freeness, efficiency, and fairness based on the parties preferences) [hereinafter BRAMS & TAYLOR(1)]. See *infra* Part III.

¹⁵ See *id.*; STEVEN J. BRAMS & ALAN D. TAYLOR, THE WIN-WIN SOLUTION (1999) [hereinafter BRAMS & TAYLOR(2)].

¹⁶ Professor in the Department of Politics, New York University.

¹⁷ Marie Louise Bailey Professor in the Department of Mathematics, Union College.

couple and result in an envy-free property distribution.¹⁸ Very little has been written analyzing the procedure from a legal perspective. Brams and Taylor believe that the potential for an envy-free¹⁹ result is the primary benefit of their new procedure. The procedure is an interesting tool because it creates incentives for divorcing couples to avoid strategic behavior and coercion, forces the couple to act rationally, and introduces a formal system into the bargaining process.²⁰ This Note suggests that the procedure in its current form has some limitations, but can still produce an envy-free and equitable marital property division at divorce. While the procedure is not perfect, it lowers the risk of an unfair property division by limiting the effect of power imbalances between the divorcing spouses.

To analyze the potential for Adjusted Winner to improve divorce bargaining it is necessary to understand the current divorce process and the factors that affect it. First, this Note briefly describes the three methods couples can utilize to develop a complete divorce agreement. Then the problems that have been identified in the current process are summarized and solutions to these problems are proposed. After establishing this framework, the theoretical background for the Adjusted Winner technique will be described along with why its creators believe it can improve divorce bargaining. Then the

¹⁸ See Steven J. Brams & Alan D. Taylor, *A Procedure for Divorce Settlement*, 13 MEDIATION Q. 191 (1996); see also Sarah Boxer, *For Birthday Parties or Legal Parties; Dividing Things Fairly is Not Always a Piece of Cake*, N.Y. TIMES, Aug. 7, 1999, at B7; Larissa MacFarquhar, *Dept. of Human Nature: A Souped-Up Pie Chart Might Put Divorce Lawyers Out of Business*, THE NEW YORKER, Aug. 16, 1999; Michael Schrage, *I Cut, You Choose: Do You Strive to Be Tough, Yet Fair? Leadership by the Numbers*, FORTUNE, Sept. 6, 1999, at 294, available at 1999 WL 7940710; Robert Uhlig, *Divorce Formula Promises Equal Slice of the Cake: American Academics Claim Simple Math Can Take Stress and Envy Out of Dividing Property*, THE DAILY TELEGRAPH (LONDON), July 15, 1999, at 9, available in 1999 WL 21605986.

¹⁹ Envy freeness is achieved when neither party "is willing to give up the portion he or she receives in exchange for the portion the other party receives". BRAMS & TAYLOR(2), *supra* note 15, at 13. This does not mean that neither party could have received additional property, but rather that both parties feel they have received as much or more than the other party. See BRAMS & TAYLOR(1), *supra* note 14, at 2.

²⁰ See Mnookin & Kornhauser, *supra* note 9, at 953 (suggesting that improving the private bargaining process in divorce will impact over ninety percent of divorcing couples).

mechanics of Adjusted Winner are illustrated through an application to a hypothetical divorce. Lastly, the procedure is analyzed in reference to the bargaining framework previously established to highlight its weaknesses and strengths.

I. THE DIVORCE PROCESS

Because divorce, like marriage, is regulated by states, the process may vary from locale to locale.²¹ There are two major distinctions between types of divorce cases: fault and no-fault. A fault divorce requires the party seeking the divorce to allege a specific statutory reason justifying a court order terminating the relationship.²² This is similar to other civil litigation in which the defendant is given the opportunity to deny the allegation and the plaintiff bears the burdens of proof and persuasion. The position of both parties will greatly dictate the length and cost of litigation. In a no-fault divorce, the party seeking a divorce is not required to allege any specific reason.²³ In most jurisdictions, the state establishes minimum requirements for obtaining a no-fault divorce, such as a period of separation or allegations of irreconcilable differences.²⁴

Regardless of the controlling law, whether fault or no-fault, divorce involves the division of assets, liabilities, and parenting responsibilities. These tangible and intangible items

²¹ Compare CAL. FAM. CODE § 2450 (West Supp. 2000) (permitting the court, upon stipulation of the parties, to order a case management plan which may include early neutral case evaluation or alternative dispute resolution) with MICH. COMP. LAWS ANN. § 552.6(3) (West 1988) (requiring Michigan couples to provide a complaint, answer, and proof of a breakdown in the marriage relationship so that "there remains no reasonable likelihood that the marriage can be preserved") and N.M. STAT. ANN. § 40-4-7.2 (Michie 1999) (permitting married couples in New Mexico to arbitrate division of property, child support and visitation, alimony, and debt allocation); see also CAL. FAM. CODE § 2320 (West Supp. 2000) (granting courts jurisdiction to grant divorce only in cases in which one party has been a resident for six months).

²² See 23 PA. CONS. STAT. ANN. § 3301 (West 1991) (permitting court to grant divorce to "innocent and injured spouse whenever it is judged that the other spouse" has "committed willful and malicious desertion", adultery, or bigamy, or treated innocent spouse cruelly, been sentenced to prison for two or more years, or made life burdensome and intolerable for innocent spouse).

²³ See CAL. FAM. CODE § 2310 (West Supp. 2000) (permitting court to grant divorce because of irreconcilable differences not specific fault of one party).

²⁴ See *id.*; 23 PA. CONS. STAT. ANN. § 3301(d) (permitting divorce due to irretrievable breakdown in marriage only after parties live apart for two years).

will ultimately be divided by a court order, but many jurisdictions permit the couple to suggest an appropriate division.²⁵ The parties' control over the ultimate division of assets and liabilities depends on the jurisdiction.²⁶ When issues remain, which the couple could not resolve privately, the court renders a decision resolving the dispute. The guidance provided to the court by the legislature, and the degree of discretion the court may utilize, depends on the jurisdiction.²⁷

Regarding property division, at one end of the spectrum are jurisdictions following the community property scheme. This dictates that assets and liabilities acquired after marriage are to be divided equally between the husband and wife.²⁸ Property acquired through gift or inheritance is considered separate from the community property.²⁹ The other extreme is a separate property jurisdiction that does not recognize that marriage has any affect on property ownership.³⁰ In these jurisdictions, the assets and liabilities are divided based on who is the title holder.³¹ Because this could lead to absurd results, no jurisdiction still follows a pure separate property scheme.³²

Couples exert their control over the divorce agreement and process through three methods: settlement, mediation, and litigation. Settlement discussions in divorce are like other forms of settlement. Lawyers work privately with their individual clients to determine what their entitlements are under the law, what their preferred outcome would be, and

²⁵ See ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, *DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY* 41 (1992) (finding that, in the absence of children, divorcing couples generally have the power to negotiate their own divorce arrangement concerning property division and alimony).

²⁶ See *id.* (finding that California grants parties the power to make a privately negotiated agreement binding and outside court jurisdiction); N.M. STAT. ANN. § 40-4-7.2, *supra* note 21.

²⁷ Compare *supra* note 8 with MICH. COMP. LAWS ANN. § 552.401 (granting trial judge discretion to award property as "appears to the court to be equitable under all the circumstances of the case, if it appears from the evidence in the case that the party contributed to the acquisition, improvement, or accumulation of the property").

²⁸ See *supra* note 5.

²⁹ See *supra* note 4.

³⁰ See *supra* note 3.

³¹ See *supra* note 3; see also *Wirth v. Wirth*, 38 A.D.2d 611, 326 N.Y.S.2d 308 (3rd Dep't 1971).

³² See Bell, *supra* note 2, at 124 ("Today, no state uses the title system of property division at divorce.").

what minimum outcome they are willing to accept.³³ Once these benchmarks are determined, the lawyers begin negotiating. Depending on the situation, negotiations may include the clients or be performed between the two lawyers alone. If an agreement is ultimately reached it will be presented to the presiding judge for approval. The court will likely approve a private agreement unless some obvious unfairness exists.³⁴ If no agreement is reached, the parties will prepare themselves for litigation or another form of court intervention, such as a court referee or court ordered mediation.

Mediation is similar to settlement discussions with the addition of a neutral third party facilitator.³⁵ Depending on the rules of the mediation, lawyers may or may not attend the mediation sessions with their clients.³⁶ The couple will meet with the mediator and begin discussing their conflict and possible resolutions. The mediator's role is to listen to the parties and help them "restate their concerns and hopes in ways that keep a variety of options open."³⁷ Mediation requires both parties to commit to negotiate in good faith and fully disclose relevant information.³⁸ As with settlement discussions,

³³ See ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATION TO AGREEMENT WITHOUT GIVING IN* 102-05 (1983) (describing benefits of knowing the client's best alternative to a negotiated agreement, called BATNA, to better judge a proposed solution); Gary N. Skoloff, *The Art and Craft of Successful Divorce Negotiation*, in *NEGOTIATING TO SETTLEMENT IN DIVORCE*, *supra* note 1, at 37, 37-38 (considering familiarity with the client and the client's goals a basic principle of negotiation); Amy Amundsen, *Tailoring Divorce Settlement Agreements to Suit the Parties*, 15 *MATRIM. STRATEGIST* 6 (1997) (recognizing the need for a divorce agreement that fits the individual needs of each spouse); Mary-Lynne Fisher & Arnold I. Siegel, *Evaluating Negotiation Behavior and Results: Can We Identify What We Say We Know?*, 36 *CATH. U. L. REV.* 395 (1987) (recognizing that when preparing for negotiation by determining client's needs and goals, priorities should be established so the negotiator knows which issues can be compromised or conceded).

³⁴ See Robert H. Mnookin, *Divorce Bargaining: The Limits of Private Ordering*, 18 *U. MICH. J.L. REFORM* 1015 (1985) (finding that even in situations involving children, courts typically "rubber-stamp" divorce agreements).

³⁵ See W. Patrick Phear, *The Dynamics of Mediation*, in *NEGOTIATING TO SETTLEMENT IN DIVORCE*, *supra* note 1, at 89, 90 ("Mediation in its most generally accepted form is a process in which a trained neutral third party helps the disputing parties come to a mutually satisfactory resolution of their own design.").

³⁶ See John Lande, *How Will Lawyering and Mediation Practices Transform Each Other?*, 24 *FLA. ST. U. L. REV.* 839, 883 (1997) ("In some places, lawyers routinely attend mediation sessions; [sic] in other places, lawyers rarely attend.").

³⁷ Phear, *supra* note 35, at 95.

³⁸ *Id.* at 90.

mediation will be most successful when the divorcing couple remains amicable with each other.

Litigation is the method of last resort. When the couple is unable to agree through settlement discussions or mediation, they may turn to the court to decide the matter. Like other forms of litigation, this may involve submitting briefs to the court or oral arguments. While most states do not provide for a jury in divorce litigation,³⁹ some states require the judge to consider certain factors when making the decision.⁴⁰ These laws have been termed "equitable distribution" laws because the goal is for the judge to divide the assets and liabilities equitably between the parties, considering certain specified factors such as the length of the marriage, the role each party played in the relationship, and the future financial potential of both parties.⁴¹

II. PROBLEMS WITH THE CURRENT DIVORCE PROCESSES

There are two problems that may occur in a divorce agreement: (1) the result may be unfair to one party, and (2) the divorce may have a negative impact on a third party. A divorce agreement may appear unfair, either objectively or subjectively.⁴² For example, if the wife receives seventy percent of the marital assets, the result may appear unfair to an outside observer. The parties may feel this is very fair because of an imbalance in future income potential. Alternatively, the assets may be divided evenly between the couple, so an outside observer, such as the judge, would perceive fairness. However,

³⁹ See, e.g., 23 PA. CONS. STAT. ANN. § 3323(a) (West 1997) (enabling either party to request a jury trial to determine any matter of fact); compare MICH. COMP. LAWS ANN. § 552.6 (West 1998).

⁴⁰ See NY DOM. REL. LAW § 236B(6)(a); MICH. COMP. LAWS ANN. § 552.401 (West 1988).

⁴¹ See *id.*

⁴² See Marsha Garrison, *Good Intentions Gone Awry: The Impact of New York's Equitable Distribution Law on Divorce Outcomes*, 57 BROOK. L. REV. 621, 628-32 (1991) (discussing the difficulty of determining fairness in property division because of the theory of marriage as an equal partnership must be balanced by reality that women are not equals in the marketplace) [hereinafter Garrison(2)].

the wife may believe this agreement is unfair because she has received primary custody of the children and therefore will have more expenses.⁴³

Obviously, an individual rarely wants an agreement that favors the other party.⁴⁴ Unfair settlement agreements are likely caused by coercion while unfair court orders are likely caused by an imbalance in entitlements under the law.⁴⁵ By limiting the potential for coercive behavior there should be fewer unfair divorce agreements.⁴⁶ Fewer unfair agreements equates to more successful private resolutions and less need for court action to resolve divorce disputes.

Outside the courtroom, one party may coerce the other by threatening to increase the transaction costs of divorce unless the other party concedes on some issue or relinquishes some entitlement under the law. Disparities between the spouses' abilities to bear the burden of the transaction costs creates power imbalances; power imbalances create opportunities for the stronger party to coerce the weaker party.⁴⁷ Therefore, equalizing the parties' abilities to bear the transaction costs should limit opportunities for coercion.

Transaction costs in divorce are present in two forms: emotional and financial.⁴⁸ The level of transaction costs will be determined by the personal history of the couple, the degree of emotional decision making, and differences between parties' personal preferences.⁴⁹ The degree of strategic behavior, excessive lawyering, and uncertainty in statutory entitlements

⁴³ See MACCOBY & MNOOKIN, *supra* note 25, at 22 (discussing the economic strain from divorce resulting from the traditional division of labor in which women care for the children while men earn the principal income).

⁴⁴ *But cf. id.* at 102 (recognizing that fathers often accept the custody arrangement proposed by the mother even when the arrangement is contrary to the father's desires).

⁴⁵ The fairness of individual divorce law entitlements is beyond this Note.

⁴⁶ See Mnookin, *supra* note 34, at 1024 (finding that if "great disparity in bargaining power exists, some bargains may arise that are unconscionably one-sided").

⁴⁷ See *id.* The party with greater bargaining power is the party who can more easily bear the burden of the transaction costs.

⁴⁸ See Mnookin & Kornhauser, *supra* note 9, at 971 ("The transaction costs that the parties must bear may take many forms, some financial and some emotional."); Wilbur C. Leatherberry, *Preparing the Client for Successful Negotiation, Mediation and Litigation*, in NEGOTIATION TO SETTLEMENT IN DIVORCE, *supra* note 1, at 25, 25 ("The financial costs and emotional litigation costs of the parties and their children are enormous.").

⁴⁹ See Mnookin & Kornhauser, *supra* note 9, at 966.

will also affect the level of transaction costs.⁵⁰ At one extreme there is an uncontested amicable divorce. Even when the split is accepted by the husband and wife, both parties will feel some emotional pain from the termination of their marriage and drastic changes in their lifestyles.⁵¹ Similarly, an amicable divorce involves some financial costs for court filing fees. While court filing fees may be minimal, for truly indigent individuals they may be quite substantial.⁵²

As the hostility in the divorce increases, both the emotional and financial costs will also increase, because more time and energy will be required to resolve the issues.⁵³ For various reasons, parties may begin to argue over what they once considered trivial matters.⁵⁴ In preparation for a trial, the parties may be forced to closely scrutinize their behavior and their spouse's behavior in the marriage. The longer and more intense the divorce becomes, the more emotionally taxing it will be.⁵⁵ If the negotiations ultimately fail, the financial transaction costs will further increase as an attorney is required to litigate the case.

Traditionally, the husband has been in the more powerful bargaining position at divorce because his social and financial prospects are greater than those of his wife.⁵⁶ For

⁵⁰ See *id.*

⁵¹ Even if the couple's lifestyle has not appeared to change, the transformation from a married person to an unmarried person is at least equal to the transformation from an unmarried person to a married person. See MACCOBY & MNOOKIN, *supra* note 25, at 20 ("Many writers have described the process of adjustment as an emotionally difficult journey, with predictable stages."); Mnookin, *supra* note 34, at 1020 ("[s]eparation often brings in its wake psychological turmoil and substantial emotional distress").

⁵² See *Boddie v. Connecticut*, 401 U.S. 371 (1971).

⁵³ See generally RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 541 (4th ed. 1992).

⁵⁴ See Mnookin, *supra* note 34, at 1020-21 (quoting I. RICCI, MOM'S HOUSE/DAD'S HOUSE 70 (1980)). Mnookin mentions the five stages of emotions that many individuals go through. The emotions of the first three stages can cause an "otherwise competent person, [to] occasionally have seriously impaired judgment." *Id.* at 1020. The third stage, accompanied by nasty emotions, can be the worst time to make any permanent decisions. *Id.* at 1021. Mnookin recognizes that this emotional turmoil "may prevent for a time any negotiated settlement[sic]. Or it may lead to a settlement that a party later regrets." *Id.*

⁵⁵ See Mnookin, *supra* note 34, at 1020 (the "psychological turmoil and substantial emotional distress" can jeopardize deliberate and informed decision-making, as well as creating or exacerbating the risk of legal conflict).

⁵⁶ Social prospect refers to the fact that it is harder for woman to remarry

example, if the husband has built his career while the wife raised the children, the husband may be better able to bear financial costs. This will give him the ability to resist an agreement in the hope that his wife will eventually run out of money and be forced to agree to an unfavorable property distribution or alimony award.

In addition, because the transaction costs of settlement are lower relative to the costs of courtroom litigation, there is an overall incentive for private bargaining,⁵⁷ but even this incentive could lead to coercion. For example, if the wife would be better off with a judicial order because the statutory scheme favors her, she may pressure her husband to agree to a more favorable agreement because she has less at risk in case settlement fails.

While the financial and emotional costs of divorce bargaining are lower than the costs associated with litigation, one must ask whether the costs could be even lower. Because divorce can be so difficult on a family, financially and emotionally, the state should strive to lower the transaction costs, thereby easing stress on the family unit.⁵⁸ Advocates of

after a divorce because men traditionally marry younger woman. Because men traditionally marry younger, and conversely women traditionally marry older, men have a social advantage after divorce. See VICTOR R. FUCHS, *WOMEN'S QUEST FOR ECONOMIC EQUALITY* 20 (1988) ("older men tend to marry younger women"); Amy L. Wax, *Bargaining in the Shadow of the Market: Is there a Future for Egalitarian Marriage?*, 84 VA. L. REV. 509, 548 (1998) ("[t]he loss of value of women on the marriage market as a function of age is driven by social customs of . . . men marrying down in age, education, and earnings" and women marrying up). A woman may feel that divorce means she will be single for the rest of her life. See *id.* at 548-49 ("Since the factors that disadvantage women all correlate with age, the end result is that divorced women on average find it harder than men to replace their mates, and these difficulties increase sharply with advancing age."). "The importance to the creation of unequal marital bargaining power of the difference in remarriage prospects grounded in the short reproductive life of women should not be underestimated." *Id.* at 548.

Financial prospects refer to the fact that traditionally, women earn less income than men. See FUCHS, *supra*, at 49 ("[E]ven in the mid-1980s the average American woman earned only two-thirds as much as the average man for each hour of work."). During marriage, the husband often invests energy in the labor market while the wife often make more marriage specific investments, such as child care. See Wax, *supra*, at 546-47 (finding the husband's labor market investment during marriage to be "portable in the event of divorce," while the wife's investments "often come at the expense of labor market opportunity costs").

⁵⁷ See POSNER, *supra* note 53.

⁵⁸ See Mnookin, *supra* note 34, at 1016 (proposing that the primary goal of the states in a divorce action should be "to facilitate the process by which the parties themselves decide the consequences of the divorce"). Mnookin agrees that states should

privatization of divorce believe that since the marriage relationship is a recognized area of privacy, the dissolution of the marriage relationship should similarly be private.⁵⁹ Controlling the factors that affect the transaction costs will reduce the impact transaction costs have on the divorcing couple, thereby minimizing opportunities for coercion, and increasing the probability that a divorcing couple may reach a fair agreement.⁶⁰ The factors that should be controlled are marital roles, emotional decision making, personal preferences of the couple, strategic behavior, uncertainty of the relevant legal entitlements, excessive lawyering, and impact on children.

A. *Marital Roles*

Imbalances in divorce bargaining may also be linked to the couple's developed roles.⁶¹ For example, if the husband always made the financial decisions in the marriage, it may be

regulate the private bargaining process in divorce to "provide an efficient and fair mechanism for enforcing such agreements, and for settling disputes when the parties are unable to agree." *Id.* at 1019. Until recently states made an effort to make divorce difficult. *See id.* at 1015 (finding that before the divorce reform movement, "divorce law attempted to restrict private ordering severely . . . by [defining] when divorce was appropriate, [structuring] the economic relationship of the spouses, and [regulating] their relationship to their children"); *see also* Roberta F. Benjamin, *The Four-Way Negotiation Conference*, in *NEGOTIATING TO SETTLEMENT IN DIVORCE*, *supra* note 1, at 47, 47 ("Unlike parties to a typical business transaction or civil litigation, parties to a divorce continue to be involved with each other in varying degrees after the legal issues have been laid to rest.").

⁵⁹ *See* Singer, *supra* note 6, at 1506-07 ("Proponents view the private nature of mediation as appropriately enhancing party control and as furthering the policy of minimum state intervention in the family.").

⁶⁰ *See* William L.F. Felstiner & Austin Sarat, *Enactments of Power: Negotiating Reality and Responsibility in Lawyer-Client Interactions*, 77 *CORNELL L. REV.* 1447, 1448 (1992) ("While the dynamics of power and negotiation are always uncertain and difficult to chart, most contemporary theorists . . . realize that power is always involved and institutionally in processes of interaction.") (quotations omitted); *but cf.* H. Joseph Gitlin, *Negotiation Settlements of Property, Alimony and Child Support*, in *NEGOTIATING TO SETTLEMENT IN DIVORCE*, *supra* note 1, at 111, 111 ("The primary way to gain leverage is to demonstrate to the other side the strengths and justifiability of your negotiating positions and your ability to take the case to trial if necessary.").

⁶¹ *See* Singer, *supra* note 6, at 1542 (describing studies of conversations between men and women who knew each other which showed that male dominance through monopolization of speaking time and frequent interruptions was so commonplace that a trained mediator may not detect the imbalance).

difficult for the wife to take on this decision-making role for herself.⁶² This inexperience may force her to rely on her attorney more, raising her transaction costs. Similarly, it may be the wife who maintains contact with family and friends, leaving the husband with less of a support network during the divorce process, making it more difficult for him to bear the emotional cost. These marital roles will not suddenly terminate when the couple decides to divorce, but rather the roles will continue to impact the couple's actions in relation to each other and the world.⁶³ A new divorce procedure should minimize the negative effects of marital roles, equalizing power between the spouses.

B. *Emotional Decision Making*

Combining the emotions of the divorcing couple with the business mentality of negotiation or litigation can lead to problems. Economists and legal scholars have proposed two models to predict how individuals make decisions with regard to the law. The first model, called rational choice, holds that decisions are made to maximize personal benefits from a limited number of resources.⁶⁴ An example of this behavior can be found in ordinary retail commerce. The seller loses an item of property in exchange for profit, thereby increasing her overall economic well-being. A buyer will only purchase an item when he believes the value of the item exceeds the money required to acquire it, thereby maximizing his economic well-being. The decision by the parties to proceed with the

⁶² See Penelope Eileen Bryan, *The Coercion of Women in Divorce Settlement Negotiations*, 74 DENV. U. L. REV. 931, 932. Professor Bryan suggests that if the husband has controlled the marital finances, the wife may too easily accept his valuation of the assets. See *id.* Furthermore, the wife "may lack the knowledge needed for successful financial negotiations." *Id.*

⁶³ See *id.* at 932 ("The roles each spouse played during the marriage and their respective spheres of authority within the marriage can exacerbate the problems created by the wife's financial dependency."); Lynn D. Feiger & Alan D. Feiger, *Clients' Emotional Problems in Dissolution of Marriage Cases*, THE COLORADO LAWYER, June 1976, reprinted in PSYCHOLOGICAL AND COUNSELING ASPECTS OF MARITAL DISSOLUTION 4, 6 (California Continuing Educ. of the Bar eds., 1979); Leatherberry, *supra* note 48, at 32 (stressing the need for attorneys to actively listen to the client because it will encourage the client to make his or her own decisions).

⁶⁴ See POSNER, *supra* note 53.

transaction is therefore a rational choice based on a common desire to maximize personal wealth.⁶⁵

The second model, behavioral choice, attempts to account for the characteristics of humanity that deviate from the rational choice model.⁶⁶ An example of behavioral choice is an individual's decision to tip a waiter in an out of town restaurant that the individual will never visit again.⁶⁷ The rational choice model predicts that the individual will balance the cost of the tip against the benefits of leaving the tip. Ordinarily the benefit of leaving a tip for a waiter is to induce better service during the next visit. In the traveling situation, the potential benefit of leaving a tip is nonexistent because there will be no next time. Rationally, the cost of the tip outweighs the benefits. Thus, under the rational choice model, no tip should be left.⁶⁸ The behavioral choice model accounts for

⁶⁵ A principle of the rational choice model is that "resources tend to gravitate toward their most valuable uses." See *id.* at 11. In our example, this means that the item for sale will gravitate toward the buyer, since the buyer will get more utility out of the item than the seller. The seller will get more utility out of the money than the property itself. This is evident by the fact that the buyer values the property higher than the money required to purchase it, while the seller values the money higher than the item itself.

⁶⁶ See Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1474 (1998) (stating theory that behavioral economics model can predict human behavior regarding decision making with more accuracy than the traditional rational choice model).

⁶⁷ See *id.* at 1492 ("People will often behave in accordance with fairness considerations even when it is against their financial self-interest and no one will know.").

⁶⁸ Judge Posner suggests an alternative analysis which predicts that the actor will leave a tip even though it appears to provide no objective benefits. See Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 STAN. L. REV. 1551, 1561-64 (1998). He suggests that fairness as a motivational factor is a result of biological evolution and should not be analyzed any differently than other forms of altruism. See *id.* Rational choice theory easily explains many examples of altruism by recognizing the interdependence of individuals. If Mr. A's welfare is linked to Mr. B's, then Mr. A will be motivated to act in ways to increase Mr. B's welfare. See *id.* at 1556. Judge Posner explains altruism as a biological trait that originated to ensure "maximizing the number of copies of one's genes by maximizing the number of creatures carrying them." *Id.* at 1561. In humans, this optimization will occur through helping one's relatives. See *id.* In prehistoric times, humans lived in small groups comprised of relatives or non-relatives closely linked to the family. See Posner, *supra* at 1561. In this society, one would maximize their genetic offspring by helping everyone. See *id.* Judge Posner suggests that as our societies have evolved to include many genetic strangers, our motivation to help others in our society has not changed. See *id.* at 1563. Thus, fairness is an instinctual decision to increase one's own self-interests. *Id.*

the apparent irrationality of the decision to leave the tip by recognizing that people may be motivated by other considerations, such as fairness.⁶⁹

While negotiation assumes rational actors, people in divorce do not always make decisions under the standard rational choice model.⁷⁰ Divorce is an emotional time and decisions will likely be affected accordingly.⁷¹ People may be motivated by spite, guilt, depression, greed, revenge, or love, rather than their own self-interest.⁷² While divorce bargaining allows the parties greater freedom to develop an individualized resolution of their divorce disputes, it also gives individuals more freedom to act emotionally rather than rationally.

As emotions increase, transaction costs will similarly increase. Negotiations may require more time because the parties may disagree on more issues.⁷³ Lawyers may work more hours to manage their clients more actively.⁷⁴ Similarly, as the possibility of a private agreement decreases, the risk of courtroom litigation increases.⁷⁵ Because divorce is such an

⁶⁹ See Jolls et. al, *supra* note 66, at 1479 (predicting that a result of fairness concerns in the behavior choice model will be actors behaving nicer or meaner, depending on how they are treated by other actors).

⁷⁰ See MACCOBY & MNOOKIN, *supra* note 25, at 54-55 ("The strong emotions attending the spousal divorce may pose a formidable barrier to collaborative, cool, and rational problem-solving.").

⁷¹ See *id.* at 20-21 (explaining that the period surrounding separation is marked by an eruption of emotions which may cause people to act in "exaggerated and uncharacteristic ways" which can jeopardize decision making); Leatherberry, *supra* note 48, at 29.

⁷² See MACCOBY & MNOOKIN, *supra* note 25, at 21 (explaining how the divorce initiator often feels guilt for leaving, while the other spouse often feels anger and rage); see also ESTHER OSHIVER FISHER, *DIVORCE: THE NEW FREEDOM* 35 (1974) (comparing the emotions at divorce to the emotions from the death of a spouse).

⁷³ See MACCOBY & MNOOKIN, *supra* note 25, at 55.

⁷⁴ See Leatherberry, *supra* note 48, at 29 (recognizing the importance of communicating to the client that his or her feelings are as significant as the legal facts because it will initiate more open communication enabling the lawyer to better understand the client's immediate needs in order to effectively begin addressing them). Leatherberry further suggests that if a lawyer stifles an emotional outburst too quickly, this may lengthen the duration of the outburst or transfer any negative emotions, originally directed at the client's spouse, to the lawyer. *Id.* at 30; see also Felstiner & Sarat, *supra* note 60, at 1455 ("the lawyer's professional skills may be severely tested by the client's guilt about marriage failure, [or] unresolved feelings for the spouse").

⁷⁵ See MACCOBY & MNOOKIN, *supra* note 25, at 21 (stating that the substantial emotional hardship of divorce can create or exacerbate the risk of legal conflict).

emotional event, it is difficult to separate emotional concerns from financial concerns.⁷⁶ For example, the wife may feel a stronger emotional need for custody because it will be more difficult for her to conceive additional children after the divorce.⁷⁷ The husband may feel less emotional need, since his ability to conceive children is much less affected by divorce.⁷⁸ These emotions may enable the husband to take advantage of his wife's vulnerability by threatening to fight for custody unless the wife sacrifices some financial asset.⁷⁹ One goal of a new procedure should be to prevent these types of negative effects resulting from emotional decision making.

C. *Personal Preferences*

When a husband and wife are dividing their assets, as their personal preferences for an asset diverge, the probability of reaching an agreement will increase. Suppose, a couple must divide a small pool of assets consisting of the marital home and sail boat. The wife desires only the home, while the husband desires only the boat. In this situation, the spouse's preferences are perfectly opposite. The couple could efficiently utilize these assets by agreeing on a division in which the wife receives the marital home and the husband receives the boat.⁸⁰ This

⁷⁶ See Benjamin, *supra* note 58, at 47 (explaining that divorce negotiation requires special skills because the disputes are so "heavily laden with intense emotions and the issues strike at the most private and vulnerable of human concerns").

⁷⁷ See Wax *supra* note 56.

⁷⁸ See *id.*

⁷⁹ Mnookin and Maccoby suggest that this form of coercion does not occur. See MACCOBY & MNOOKIN, *supra* note 25, at 155-56. In their study, there was no financial impact from mothers who were required to negotiate to achieve their custody desire than mothers who easily achieved their custody desire. See *id.* One explanation they offer is that the anecdotal evidence makes the threat of coercion implicit in all divorce bargaining whether the father expresses this or not. See *id.* at 156. Another explanation offered was that the group studied, California couples, benefited from high certainty regarding custody and financial entitlements. See *id.* at 157. Because the law was certain there was no way to coerce the mother into accepting a lower financial reward in exchange for greater custody. See *id.* In the end, it is still unclear whether fathers will use custody as a threat to force the mother into accepting a lower financial share of the marital assets.

⁸⁰ See *supra* notes 63-64 and accompanying text; see also Ann Laquer Estin, *Economics and the Problem of Divorce*, 2 U. CHI. L. SCH. ROUNDTABLE 517, 531-35 (1995) (analyzing proposals to permit only divorce consented to by both partners in terms of Pareto efficiency). Looking at divorce economically, a rational decision to

example shows how the probability of achieving a Pareto superior resolution⁸¹ increases as the divergence in personal preferences increases.

This issue is especially relevant in divorce bargaining because personal preferences are not always motivated by a rational desire to increase economic well-being. Preferences of a divorcing couple may be motivated by various emotions.⁸² For instance, the husband may have a desire for the marital home, not because he truly wants ownership but merely to prevent his wife from receiving ownership. As the couple's preferences overlap, the need for negotiation will increase. Ultimately, if the couple's preferences are perfectly similar, they may be unable to agree, requiring court resolution. A goal of a new divorce procedure should be to take full advantage of differences in a divorcing couple's preferences while minimizing conflict when preferences overlap.

D. *Strategic Behavior*

The goal of strategic behavior is to gain an advantage in the bargaining process by utilizing information about the other party. Strategic behavior can lead one party to bluff, lie, or threaten, in hopes of persuading the other side to accept less.⁸³ Strategic behavior requires knowledge of the other party's preferences, the other party's risk preferences and ability to bear transaction costs, and some knowledge of the expected outcome if negotiation fails and litigation is necessary.⁸⁴

divorce means the individual believes there is greater value in being single than remaining married, taking into consideration all relevant emotional and financial factors. *See id.* at 534. If the state required both parties to consent to the divorce, that would ensure that neither party would be less off after the divorce. *See id.*

⁸¹ A Pareto superior solution occurs when neither party is worse off and at least one party is better off. *See* POSNER, *supra* note 53; Mnookin & Kornhauser, *supra* note 9, at 973-74 ("opportunities for making both [parties] better off through a negotiated agreement will exist to the extent that parental preferences differ"). For a full discussion of Pareto optimal divorce resolutions, *see* Estin, *supra* note 80.

⁸² *See* Mnookin & Kornhauser, *supra* note 9, at 968 ("[O]ne can easily imagine preferences that reflect spite and envy."). Mnookin and Kornhauser also recognize that parents may be motivated by altruistic concerns for their children, not merely anger or spite towards the other parent. *See id.*

⁸³ *See id.* at 972-73.

⁸⁴ *See id.*

Strategic behavior in divorce poses a special threat because negotiating parties in divorce were once in an intimate relationship and will know a great deal about each other. This knowledge can be helpful or harmful.⁸⁵ If both parties are equally aware of the other's preferences, there may be a beneficial effect. Rather than use the knowledge against each other, they could use the knowledge to quickly divide the assets based on their preferences.⁸⁶ Alternatively, both parties could attempt to use strategy to maximize their share of the assets.⁸⁷

How parties choose to use their knowledge may depend on the divorce process they choose. A mediator may prevent this type of strategic behavior by working with the parties to state their individual settlement goals without reference to the other party and by assisting the parties to realize the benefits of working together in developing a divorce agreement.⁸⁸ Furthermore, since mediation requires both parties to negotiate in good faith, individuals who insist on strategic behavior may simply refuse to mediate.

In settlement discussions, no neutral role exists. The lawyers and clients decide how to frame the discussion and use the available information.⁸⁹ The participants are free to behave

⁸⁵ See Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509, 514 (1994) (recognizing the opportunity and limits of using knowledge strategically when resolving a two party dispute).

⁸⁶ See *id.* at 542-43 ("Cooperative divorce lawyers . . . as intermediaries may be able to create gains that the spouses could not realize alone."); Singer, *supra* note 6, at 1502 (suggesting that mediation can resolve conflict with "gains to both parties, as well as to children" because cooperative solutions are not limited to one side winning and the other side losing).

⁸⁷ See Gilson & Mnookin, *supra* note 85, at 543 (recognizing the danger of cooperative moves if not reciprocated by the other side). Gilson and Mnookin suggest that a "reputational network" exists among family law practitioners, so cooperative and uncooperative attorneys are easily identified. See *id.* at 543-48.

⁸⁸ See Singer, *supra* note 6, at 1502 ("mediation reduces hostility and minimizes divorce-related trauma . . . by facilitating direct communication between the parties and by converting disputes that the adversary system tends to present as zero-sum conflicts into problems that can be solved with gains to both parties"); Andrew S. Watson, *Mediation and Negotiation: Learning to Deal with Psychological Responses*, 18 U. MICH. J.L. REFORM 293, 294 (1985) ("The mediator stands between the parties, asserting no position of his own but, rather, drawing from them a solution that the parties and others perceive as fair and equitable."); see also *supra* notes 37-38 and accompanying text.

⁸⁹ See Gilson & Mnookin, *supra* note 85, at 545 (finding that in northern California population studied a substantial amount of selection occurs between clients

strategically, only limited by their ability to bear the resulting increase in transaction costs.⁹⁰ If the parties are able to cooperate, time, money, and effort will be saved and the parties' satisfaction with the agreement will increase.⁹¹

Conversely, a party utilizing strategic behavior risks a failure in the negotiations, requiring litigation to resolve their dispute.⁹² The degree of strategic behavior will largely depend on the couple's individual risk preferences.⁹³ Individuals may be risk averse, risk neutral, or risk preferrers.⁹⁴ Someone who is risk averse would rather accept a known agreement than risk an unknown adjudication, while a person who prefers risk will rather gamble on an unknown adjudication rather than accept a known agreement.⁹⁵ A risk neutral person reacts to risk with behavior in between these two extremes.⁹⁶ For example, if a husband is risk averse and his wife is a risk preferrer and there is a high degree of uncertainty, the husband will have a greater incentive to reach a private agreement. This may enable the wife, the risk preferrer, to achieve a better agreement for herself by strategically taking advantage of her husband's aversion to risk. The husband must not only consider the outcome of the negotiation if he concedes to the threat, but also the litigation outcome if he does not. This will increase the husband's transaction costs, further persuading him to agree to his wife's proposal. A priority of a new divorce procedure should be to discourage strategic behavior and create incentives for cooperation.

and attorneys, so cooperative attorneys work with cooperative spouses, while adversarial spouses hire adversarial attorneys).

⁹⁰ See *id.* at 546 (quoting an attorney who accused an adversary of routinely taking unreasonable positions and going to court too often). Mediation proponents believe substitution of mediation for more adversarial forms of dispute resolution will result in significant cost savings to couples. See Singer, *supra* note 6, at 1503. Cooperative settlement negotiations between lawyers could similarly result in cost savings.

⁹¹ See Gilson & Mnookin, *supra* note 85, at 541 (suggesting there are opportunities to increase value to both parties and improve the outcome of a divorce settlement, if clients and attorneys cooperate).

⁹² The risk inherent in litigation will depend on the uncertainty of the relevant divorce law. See *infra* Part II.E.

⁹³ See Mnookin & Kornhauser, *supra* note 9, at 971-72.

⁹⁴ See *id.* at 971.

⁹⁵ See *id.*

⁹⁶ See *id.*

E. *Uncertainty of Legal Entitlements*

Entitlements under the law will determine the minimum that each party will accept through bargaining.⁹⁷ "In other words, the outcome that the law will impose if no agreement is reached gives each [party] bargaining chips—an endowment of sorts."⁹⁸ For example, in a community property jurisdiction, where the law requires a judge to divide the marital property evenly between the couple, neither individual will likely agree to a divorce settlement that gives them less than half the property. When entitlements are less clear, both parties become less aware of their bottom line positions. Similarly, each party will be less aware of the other party's bottom line, increasing the chance of proposing unacceptable solutions. It also becomes harder to evaluate a proposal in reference to one's unknown bottom line position. Equitable distribution laws trade an increase in uncertainty of entitlements for more judicial discretion in order to ensure fairness.⁹⁹

Strategic behavior will be more effective and subtly encouraged as entitlements become more vague.¹⁰⁰ Because a bluff or threat cannot be evaluated properly if the law regarding the outcome is unclear, there is a higher chance of succeeding through these tactics. This may result in "a game of chicken,"¹⁰¹ in which both parties get carried away with strategic behavior, ending up in court.¹⁰² In this context, entitlements under the law can be viewed as establishing a

⁹⁷ See FISHER & URY, *supra* note 33, at 104 ("The reason you negotiate is to produce something better than the results you can obtain without negotiating."); Benjamin, *supra* note 58, at 52 ("Most important, the attorney should analyze the range of proposals against the backdrop of the likely outcome were the case to be tried.").

⁹⁸ Mnookin & Kornhauser, *supra* note 9, at 968.

⁹⁹ See Garrison(1), *supra* note 1, at 512 ("[J]udges have failed to achieve predictable and consistent outcomes in many areas of divorce decision making [deriving] from the novelty of the statutory provisions [in N.Y.] coupled with the conflicting, and at times incoherent, principles upon which judges have been directed to base the decision-making process.").

¹⁰⁰ See *supra* note 84 and accompanying text.

¹⁰¹ Mnookin & Kornhauser, *supra* note 9, at 975 (internal quotations omitted).

¹⁰² See *id.*

framework within which the bargaining couple can negotiate comfortably.¹⁰³

In an effort to balance uncertainty and fairness, many states adopted equitable distribution laws which permit a judge to divide the assets at his or her discretion, often after considering a specific list of factors.¹⁰⁴ Compared to the community property or common law rules, granting the judge discretion to divide the assets increases the level of uncertainty, but also prevents absurd results.¹⁰⁵ The debate concerning the merits of judicial discretion in divorce disputes is ongoing.¹⁰⁶

Marsha Garrison¹⁰⁷ performed an extensive empirical study to analyze the level of predictability in New York state divorce cases under the current equitable distribution law.¹⁰⁸ Concerning marital property distribution, she found less variation in litigation outcomes than in settlement outcomes.¹⁰⁹ Looking at the data more closely, Professor Garrison found no pattern emerging.¹¹⁰ She suggests that the variations are due to private values of individual judges, not the analysis of the statutory factors.¹¹¹

¹⁰³ See *id.* at 950 (suggesting that divorce law provides a "framework within which divorcing couples can themselves determine their postdissolution rights and responsibilities"); see also FISHER & URY, *supra* note 33, at 102-04 (discussing the benefits of establishing a best alternative to a negotiated agreement (or "BATNA") before beginning negotiations).

¹⁰⁴ See, e.g., N.Y. DOM. REL. LAW § 236B(1) (McKinney 1986 & Supp. 1999) (keeping premarital property, gifts, inheritances, and personal injury awards separate from marital property for purposes of distribution as a result of divorce); MICH. COMP. LAWS ANN. § 552.401 (West 1988) (granting trial judge discretion to award property as "appears to the court to be equitable under all the circumstances of the case, if it appears from the evidence in the case that the party contributed to the acquisition, improvement, or accumulation of the property").

¹⁰⁵ See, e.g., *Wirth v. Wirth*, 38 A.D.2d 611, 326 N.Y.S.2d 308 (App. Div. 1971).

¹⁰⁶ See Garrison(1), *supra* note 1, at 411.

¹⁰⁷ Professor of Law, Brooklyn Law School.

¹⁰⁸ See Garrison(1), *supra* note 1, at 430 (analyzing approximately 900 divorces from 1978 and an additional 900 from 1984, four years after the passage of N.Y. DOM. REL. LAW § 236B).

¹⁰⁹ She found that Judges tend toward an equal distribution norm. See *id.* at 455. She also found that "settlement outcomes were highly disparate and widely distributed along a zero to one hundred percent scale." *Id.* at 452.

¹¹⁰ *Id.* at 505 ("Depending on which economic decision we take as an example, evidence can be found to support the claims of either discretion's critics or its champions.").

¹¹¹ *Id.* at 506 ("Discretion thus sometimes produced outcomes that appear to rely more on private values than on public standards.").

For a divorcing couple, this study provides a mixed message. If they resort to litigation, the property division is likely to be near equal.¹¹² However, divorcing couples are left without any reliable method to predict how the division in their particular case will deviate from an equal division.¹¹³ One way to solve this problem is to generate new rules for property division.¹¹⁴ Another way to resolve this problem, or at least ease the parties' burden, is to utilize a bargaining system which limits the effect that the law will have in the decision-making process.¹¹⁵

F. *Excessive Lawyering*

Lawyers play a special role in the divorce bargaining arena. They act as emotional counselors,¹¹⁶ role models,¹¹⁷ financial advisers,¹¹⁸ as well as legal counselors.¹¹⁹ At every step in the negotiation process, lawyers can either facilitate or frustrate.¹²⁰ Normally, attorneys will help the client determine

¹¹² See Garrison(1), *supra* note 1, at 455.

¹¹³ See *id.* at 505-06 ("Judges seem to agree on relatively equal division as a prototypical outcome, but do not appear to have reached sufficient consensus on the factors that justify departure from equal division, to permit reliable outcome predictions.").

¹¹⁴ See *id.* at 517-18 (discussing the advantages and disadvantages to a divorce system more reliant on rules rather than judicial discretion).

¹¹⁵ Cf. *Id.* at 416 (finding evidence to suggest that current divorce litigants "frequently reach settlement decisions with little awareness of, or concern for, legal norms").

¹¹⁶ See Leatherberry, *supra* note 48, at 25 (recognizing that the lawyer may play the role of therapist in divorce counseling and as the client progresses through stages of divorce the lawyer should respond accordingly).

¹¹⁷ See Benjamin, *supra* note 58, at 47 (suggesting that lawyers serve as role models for their clients in conflict resolution); Liebman, *supra* note 1, at 21 ("Lawyers teach their clients a great deal about how to dispute and how to negotiate.").

¹¹⁸ See Gitlin, *supra* note 60, at 115 ("A major consideration in setting levels of alimony and child support is the tax consequence to each party.").

¹¹⁹ For a general discussion of the multiple functions lawyers play in the divorce bargaining, see Mnookin & Kornhauser, *supra* note 9, at 985.

¹²⁰ See *id.* at 986 ("Lawyers may make negotiations more adversarial and painful, and thereby make it more difficult and costly for the spouses to reach agreement."); FISHER & URY, *supra* note 33, at 112-33 (describing tactics a cooperative lawyer can employ when confronted with an adversarial lawyer in the negotiation context); Gilson & Mnookin, *supra* note 85, at 542-43 ("Cooperative divorce lawyers may [] provide an escape: by credibly committing their clients to cooperate, the lawyers as intermediaries may be able to create gains that the spouses could not realize alone."); Liebman, *supra* note 1, at 20 (finding that adversarial lawyers may prolong

what he or she wants and what he or she is willing to concede.¹²¹ The attorneys will also develop the negotiation strategy, choosing between the cooperative or adversarial approach.¹²² These are crucial activities in any negotiation, and possibly more important in divorce negotiation.¹²³ The choices each attorney makes will have significant consequences on the overall success of the negotiation.¹²⁴ In addition, negotiation often occurs between the two lawyers, who later communicate updates to their respective clients, which can lead to communication problems, rumors, and confusion.¹²⁵

the divorce bargaining process unnecessarily by negotiating over issues that are not important to the ultimate settlement).

¹²¹ See Liebman, *supra* note 1, at 20 ("In a problem-solving negotiation, the lawyers would identify their clients' interest . . . [to] see opportunities for a variety of [solutions]"); Skoloff, *supra* note 33, at 37 (stating that proper representation means that the attorney understands the client's goals).

¹²² See Skoloff, *supra* note 33 at 39 (recognizing that establishing a negotiation plan based on the client's goal is important to success).

¹²³ Most negotiation occurs between businessmen who are experienced in the process. Divorce often involves two people who are completely inexperienced in negotiation. See Benjamin, *supra* note 58, at 53 ("no matter how sophisticated, [the client] will [generally] be wholly inexperienced in this sort of negotiation"). This inexperience can lead to inefficiencies. See *id.* at 56 (suggesting that attorney's in negotiations sessions with the clients have a responsibility to focus on problem-solving, because clients will likely continue to bring up past conflicts).

¹²⁴ See ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATION TO AGREEMENT WITHOUT GIVING IN 134 (1983). If one attorney decides to be combative, while the other chooses to be cooperative, a power imbalance will result affecting the equity of the agreement. See Liebman, *supra* note 1, at 19 (suggesting that a combative attorney may miss opportunities to generate gains for both clients); Mnookin & Kornhauser, *supra* note 9, at 986 (finding that lawyers may make negotiations more adversarial and thereby more costly, or they may make "negotiations more rational, minimize the number of disputes, discover outcomes preferable to both parties, [and] increase the opportunities for resolution out of court").

¹²⁵ This is similar to the children's game "telephone" where a group of children line up and a message is whispered from child to child. The game is fun because the message is inadvertently changed along the line of children. When this happens between two adults undergoing a divorce, it is not fun. See Craig A. McEwen et. al., *Bring in the Lawyers: Challenging the Dominant Approaches to Ensuring Fairness in Divorce Mediation*, 79 MINN. L. REV. 1317, 1380 (1995) (describing the benefits of face to face discussions in which the spouses and lawyers are present as there are fewer communication problems arising because messages must be passed through lawyers, fewer rumors, and the client maintains greater control over decision making); Edward M. Ginsburg, *The Settlement Process—The View From the Bench*, in NEGOTIATING TO SETTLEMENT IN DIVORCE, *supra* note 1, at 71 (describing the benefits of face to face negotiations with the clients present, suggesting that this type of meeting is "almost always productive").

It is generally agreed that cooperative, rather than combative negotiations are more efficient,¹²⁶ lead to better results,¹²⁷ and require lower transaction costs.¹²⁸ Divorcing couples can impact the negotiation atmosphere by choosing cooperative attorneys, or utilizing a mediator.¹²⁹ Difficulties may still arise if both spouses do not wish to be cooperative.¹³⁰ Some recent literature has proposed that non-adversarial bargaining can be more efficient and lead to better results, but not all attorneys have adopted the problem-solving technique.¹³¹ Similarly, not all mediators agree on how to handle power imbalances between the parties.¹³² An agreement

¹²⁶ See Liebman, *supra* note 1, at 15 ("it seems more difficult to be an effective negotiator using a competitive style"). Liebman suggests that the ineffectiveness of combative negotiators arises from the higher risk of a negotiation breakdown, inappropriately linking issues, and ignoring the client's emotions. See *id.* at 19-20.

¹²⁷ See FISHER & URY, *supra* note 33, at 73 (stressing benefit of developing mutually advantageous solutions, rather than viewing negotiation as zero-sum game, in which a gain for one party means a loss for the other party); Gilson & Mnookin, *supra* note 85, at 542 ("in many circumstances, cooperation [in divorce bargaining] can create value and improve the outcome from each party's point of view") (internal quotations omitted); Skoloff, *supra* note 33, at 39 (finding that combative negotiation style can "spell disaster" because parties will be less able to resolve future conflicts).

¹²⁸ See Gilson & Mnookin, *supra* note 85, at 542; Singer, *supra* note 6, at 1502 ("by facilitating direct communication between the parties and by converting disputes that the adversary system tends to present as a zero-sum conflicts into problems that can be solved with gains to both parties").

¹²⁹ See Lande, *supra* note 36, at 889 ("Mediation can [] offer a useful forum for lawyers who want to use a problem-solving approach to negotiation", rather than a combative approach); Gilson & Mnookin, *supra* note 85, at 545 (suggesting that there is a great deal of "sorting and self-selection" among divorce lawyers and clients, so clients wishing a cooperative negotiation approach selected lawyers who shared this attitude); Singer, *supra* note 6, at 1502 (finding that proponents of mediation argue that mediation reduces hostility and minimizes emotional trauma to spouses and children by "converting disputes that the adversary system tends to present as zero-sum conflicts into problems that can be solved with gains to both parties, as well as to children").

¹³⁰ See Gilson & Mnookin, *supra* note 85, at 545 (discussing difficulty cooperative attorneys often face when representing a client whose spouse chose a combative attorney); Singer, *supra* note 6, at 1541-42 (suggesting that mediation may be ineffective to control power imbalances that exist between the parties).

¹³¹ See, e.g., Gilson & Mnookin, *supra* note 85, at 545; Skoloff, *supra* note 33, at 43 ("Threats can be used in resolving disputes").

¹³² See Phear, *supra* note 35, at 90 (finding that the current standards of mediation practice prohibits the mediator from providing advice to the parties, which "makes it essential that the parties have access to outside advisers"); McEwen et al., *supra* note 125, at 1323-25 (discussing the debate over the fairness of mediation, referring to critics' claims that mediators themselves may coerce a weak party and proponents' claims that properly trained mediators can compensate for power

facilitated by an ill-trained mediator may encompass a higher transaction cost than an agreement negotiated between two experienced and trained attorneys.¹³³ Because of the risk inherent in a combative agreement, a new divorce process should encourage lawyers and clients to negotiate cooperatively, while limiting the influence of a lawyer or client who wishes to be combative.

G. *Impact on Children*¹³⁴

When two parties negotiate combatively, they may forget about the impact on their children, family, and friends.¹³⁵ During the divorce proceedings, child custody and child care expenses may become bargaining chips in the negotiation.¹³⁶ Whether parents actually trade financial rights for custody is not clear.¹³⁷ Even if such trades are not common, when they do occur, evidence suggests that child support agreements are negatively affected.¹³⁸ Also, when resolving custody conflicts, judges utilize the "best interest of the child standard" which

imbalances between the parties); Singer, *supra* note 6, at 1542 ("Considerable disagreement [exists] within the mediation community about whether, and how, a mediator should attempt to remedy power imbalances.").

¹³³ See McEwen et al., *supra* note 125, at 1343 ("Now, the quality or fairness of mediation is treated as a direct product of the mediator"); Singer, *supra* note 6, at 1503 (finding that if mediation fails to resolve all conflict, traditional negotiation or court proceedings will be necessary, eliminating any potential time savings).

¹³⁴ While this paper does not focus on the impact to third parties, it would be prudent to briefly discuss the issue.

¹³⁵ See MACCOBY & MNOOKIN, *supra* note 25, at 24 (emphasizing that rearranging the parental roles is greatly complicated by the simultaneous redefinition of each spouse's financial and emotional situation).

¹³⁶ See Singer, *supra* note 6, at 1550 ("common divorce bargaining practice of a parent trading off financial claims for custody assurances").

¹³⁷ Maccooby and Mnookin suggest these tradeoffs do not occur. See MACCOBY & MNOOKIN, *supra* note 25, at 152-54 (suggesting mothers are more likely than fathers to receive the custody arrangement they desire because fathers fail to voice their custody desire); but see Bryan, *supra* note 62, at 936-37 (suggesting that wives, due to limited finances, often hire lawyers who fail to give their case the attention necessary, often coercing them into an unfair agreement); James T. Friedman, *Negotiating Child Custody Cases*, in NEGOTIATING TO SETTLEMENT IN DIVORCE, *supra* note 1, at 133, 133 ("some spouses will not hesitate to take an arbitrary or aggressive stance on custody or visitation issues to create settlement leverage for property and support issues"). Singer suggests these tradeoffs are commonplace. See Singer, *supra* note 6, at 1550.

¹³⁸ See Singer, *supra* note 6, at 1550.

provides little guidance for couples to bargain privately.¹³⁹ Thus, when child custody arrangements are added to the list of issues requiring resolution, the bargaining dynamics become significantly more complex, making it more difficult to reach a private agreement.¹⁴⁰

Once a divorce agreement has been reached, whether through private negotiations or court proceedings, the parents must still work together to raise the child.¹⁴¹ During the divorce process, one parent may have formed a "parental alliance"¹⁴² with the child to exclude the other parent.¹⁴³ A child's respect for parental authority may be weakened after viewing parental conflicts.¹⁴⁴ Similarly, evidence suggests that parental conflict may lower the behavior standards for the children.¹⁴⁵ Recent evidence also suggests that the psychological effect of divorce on the couple's children lasts longer and is more serious than previously believed.¹⁴⁶ A new procedure must not fail to consider the impact divorce will have on a couple's children. To lessen a negative impact, a new procedure should limit parental conflicts and assist couples to separate the financial issues from the parental issues, preventing the use of custody threats.

III. THE ADJUSTED WINNER PROCEDURE

To ensure fairness in real-life dispute resolution, Steven J. Brams and Alan D. Taylor developed Adjusted Winner.¹⁴⁷ They began by looking at the simple problem of

¹³⁹ See *id.*; Bryan, *supra* note 62, at 934 ("The 'best interest of the child' standard is so indeterminate as to be no standard at all."); see also *supra* Part III.E.

¹⁴⁰ See MACCOBY & MNOOKIN, *supra* note 25, at 24-25; Friedman, *supra* note 137, at 133 ("The attorney has to undertake a unique burden in negotiating child custody cases").

¹⁴¹ See MACCOBY & MNOOKIN, *supra* note 25, at 24-25 ("the parents will need to deal with each other as co-parents, even though they are no longer spouses").

¹⁴² *Id.*

¹⁴³ See *id.*

¹⁴⁴ See MACCOBY & MNOOKIN, *supra* note 25, at 24 ("If parents quarrel openly in front of children, . . . the atmosphere of mutual respect that underlies their joint authority . . . is seriously weakened.")

¹⁴⁵ See *id.* ("as the parental alliance weakens, the behavior standards for the children decline").

¹⁴⁶ See Singer, *supra* note 6, at 1550.

¹⁴⁷ See Brams & Taylor, *supra* note 18, at 191.

dividing a piece of cake between two parties.¹⁴⁸ They applied game theory principles¹⁴⁹ to predict the strategies two parties would consider under different division schemes.¹⁵⁰ Adjusted Winner was developed to mitigate the risk of strategic behavior during negotiations, in an effort to guarantee the creation of an agreement that both parties would consider equitable.¹⁵¹ According to Brams and Taylor, objective equity is less important than subjective equity.¹⁵² If both parties perceive their share of the division to be equal to or larger than the other party's share, there will be no envy and the division is equitable. Brams and Taylor claim that their new procedure can be used in divorce bargaining to achieve an envy free, equitable result.¹⁵³

¹⁴⁸ Brams and Taylor analyzed the simple divide and choose algorithm in the context of two individuals splitting a piece of cake. See BRAMS & TAYLOR(1), *supra* note 14, at 8. This system requires one party to divide the goods into two separate groups. See *id.* at 9. The second party chooses which group he will take and the first party receives the other group. See *id.*

¹⁴⁹ See generally DOUGLAS G. BAIRD ET AL., GAME THEORY AND THE LAW (1994); THOMAS C. SCHELLING, CHOICE AND CONSEQUENCE 213-26 (1984).

¹⁵⁰ See BRAMS & TAYLOR(1), *supra* note 14, at 7-8.

¹⁵¹ Brams and Taylor explain that their "approach to fair division is distinctive . . . in elevating the property of 'envy-freeness,' and algorithms that generate envy-free allocations, to a central place in the study of fair division." BRAMS & TAYLOR(1), *supra* note 14, at 1. They later explain how a Pareto superior solution can fail to be envy-free. An envy-free solution guarantees that neither party will envy the other, but does not guarantee that both parties receive maximum utility from the division. See *id.* at 2 n.2. A Pareto superior analysis focuses on what parties receive, rather than how parties perceive their portion of the division relative to the other party's portion. See *id.*

¹⁵² See Brams & Taylor, *supra* note 18, at 193. Brams and Taylor explain the relationship between envy-free and equitable:

Note that envy-freeness and equitability both address the question of whether one player believes he or she did as well as the other player. The difference is that envy-freeness involves a comparison based on a personal valuation, which is captured by the following question: Are you better off with your allocation and, hence, would not desire to swap with the other player? Equitability, on the other hand involves an interpersonal comparison: Is your valuation of what you received equal to the other player's valuation of what he or she received?

Id.

¹⁵³ See Brams & Taylor, *supra* note 18; see also Boxer, *supra* note 18; MacFarquhar, *supra* note 18; Schrage, *supra* note 18; Uhlig, *supra* note 18.

A. *Game Theory Principles*

Game theory is a combination of mathematics, sociology, and psychology, which attempts to model different interpersonal interactions to predict how people will react.¹⁵⁴ In the legal context, game theory has been utilized by legal scholars to better understand corporations,¹⁵⁵ international negotiations,¹⁵⁶ torts settlement,¹⁵⁷ labor relations,¹⁵⁸ and contract law.¹⁵⁹ In game theory, different interactions are modeled into games or puzzles and then solved for the best solution. The basic elements of a game are (1) the actors, (2) the consequences of different choices, and (3) the strategies available.¹⁶⁰ An example of a game theory model is the well-known prisoner's dilemma in which two alleged accomplices are arrested and separated by the police for questioning.¹⁶¹ The district attorney cannot convict either of them without extracting at least one confession, meaning that if both suspects remain silent, neither will go to jail.¹⁶² The district attorney tells both suspects that if they provide information implicating the other suspect, the informant will receive no jail time. If they provide no information but the other suspect implicates them, the one who was silent will receive a sentence of ten years in jail. If both suspects confess, implicating each other, they will both receive sentences of five years in jail. This

¹⁵⁴ See BAIRD ET AL., *supra* note 149; Martin Shubik, *Symposium—Just Winners and Losers: The Application of Game Theory to Corporate Law and Practice: Game Theory, Law and the Concept of Competition*, 60 U. CIN. L. REV. 2, 285 (1991) (explaining that the study of game theory is essentially the study of the basic elements of "conflict and cooperation").

¹⁵⁵ See Shubik, *supra* note 154, at 285; Joseph Kattan & William R. Vigdor, *Application of Game Theory to Antitrust: Game Theory and the Analysis of Collusion in Conspiracy and Merger Cases*, 5 GEO. MASON. L. REV. 441, 442 (1997).

¹⁵⁶ See Moshe Hirsh, *Game Theory, International Law, and Future Environmental Cooperation in the Middle East*, 27 DENV. J. INT'L L. & POL'Y 75 (1998).

¹⁵⁷ See BAIRD ET AL., *supra* note 149, at 6-28 (comparing game theory models of negligence and strict liability).

¹⁵⁸ See *id.* at 237.

¹⁵⁹ See Avery Katz, *The Strategic Structure of Offer and Acceptance: Game Theory and the Law of Contract Formation*, 89 MICH. L. REV. 215 (1990).

¹⁶⁰ See BAIRD ET AL., *supra* note 149, at 8.

¹⁶¹ See *id.*

¹⁶² See *id.*

collection of choices and consequences can be modeled in the matrix shown in Figure 1.¹⁶³

		<u>Suspect B</u>	
		Confess	Silence
<u>Suspect A</u>	Confess	5,5	0,10
	Silence	10,0	0,0

Figure 1. Model of the prisoner's dilemma game, showing the choices available to both players, and the jail time in years resulting from the different strategy combinations.

The choices along the rows in Figure 1 represent those available to suspect A and the choices along the columns represent the choices available to suspect B. The numbers in each cell represent the length of jail time that each player will receive as a consequence of the combination of the choices made by each suspect.¹⁶⁴ For example, when suspect A confesses while suspect B remains silent, suspect A will receive zero years in jail and suspect B will receive ten years in jail. After modeling the game, the next step is to identify the strategies that maximize each suspect's result.

The suspects share a goal, minimizing jail time.¹⁶⁵ The best strategy for both suspects to follow is to confess.¹⁶⁶ If suspect A confesses while suspect B remains silent, then suspect A will spend no time in jail while suspect B spends ten years behind bars. The opposite result would occur if suspect B confesses and suspect A remains silent. If both suspects confess, then they each spend five years in jail. While five years in prison is a worse result than no jail time, five years in jail is better than ten years in jail. Confession guarantees each suspect the best result possible irregardless of the choice made by the other suspect.¹⁶⁷ No matter what suspect A does, suspect B will improve his result by confessing. Without information

¹⁶³ See *id.*; Shubik, *supra* note 154, at 288.

¹⁶⁴ Suspect A's jail time is listed first. Suspect B's jail time is listed last.

¹⁶⁵ See BAIRD ET AL., *supra* note 149, at 33.

¹⁶⁶ See *id.*

¹⁶⁷ See *id.*

regarding the choice made by the other suspect, neither suspect has an incentive to deviate from this strategy.¹⁶⁸

This combination of strategies, from which neither suspect has an incentive to deviate, is called the Nash equilibrium.¹⁶⁹ While this does not result in the best possible outcome, it is the most stable and most efficient outcome.¹⁷⁰ By modeling a conflict in this way, the parties can utilize available information to develop strategies to maximize their reward. It is precisely this type of strategic behavior which Brams and Taylor claim Adjusted Winner will deter without sacrificing either party's satisfaction with the result.¹⁷¹

B. *How Adjusted Winner Works*

The Adjusted Winner Procedure is a point allocation scheme that allows parties to assign values to individual negotiation issues, representing their preference to win that issue.¹⁷² In divorce, the issues involved are the marital assets and the point assignments represent the individual's preference to receive a particular asset.¹⁷³ Similar point

¹⁶⁸ See *id.*

¹⁶⁹ See *id.* at 21. Nash equilibrium is explained as:

The combination of strategies that players are likely to choose is one in which no player could do better by choosing a different strategy given the strategy the other chooses. The strategy of each player must be a best response to the strategies of the other. The solution concept based on this principle is known as a Nash equilibrium. Introduced by John Nash in 1950, the Nash equilibrium has emerged as a central-probable the central-solution concept of game theory.

BAIRD, *supra* note 149, at 21; see also Shubik, *supra* note 154, at 291 ("The most highly used solution concept applied to games in strategic form is the noncooperative equilibrium suggested by J. F. Nash Jr.").

¹⁷⁰ See Shubik, *supra* note 154 at 292 ("If both players act accordingly, they will confirm their expectations and neither will have any incentive to depart from the resultant outcome, even though there may be outcomes which might yield more to both of them.").

¹⁷¹ See Brams & Taylor, *supra* note 18, at 197; BRAMS & TAYLOR(2), *supra* note 15, at 80 ("if knowledge is roughly symmetric, then attempts by both sides to be strategic can lead to disaster"). BRAMS & TAYLOR(1), *supra* note 14, at 67 (claiming Adjusted Winner guarantees efficiency, envy-freeness, and equitability).

¹⁷² See BRAMS & TAYLOR(2), *supra* note 15, at 70; Brams & Taylor(1), *supra* note 14, at 65; Brams & Taylor, *supra* note 18, at 192.

¹⁷³ See BRAMS & TAYLOR(2), *supra* note 15, at 70 ("The parties [] indicate how much they value obtaining the different goods . . . by distributing 100 points across them.").

allocation algorithms were suggested by two separate groups in the mid-1980s in an effort to facilitate stalled nuclear arms reduction negotiations.¹⁷⁴ The inherent advantage to point allocation schemes is the opportunity for negotiating parties to subjectively value the items over which they are bargaining.¹⁷⁵ Brams and Taylor suggest that this advantage will lead to a property division in divorce optimizing the allocation of resources between the couple.¹⁷⁶ To evaluate the effectiveness of Adjusted Winner in divorce bargaining, it is necessary to analyze how the procedure affects the existing problems and whether the procedure will create any new problems.¹⁷⁷

¹⁷⁴ Russell Leng and William Epstein proposed that each superpower should distribute 1000 points among their adversary's arsenal. The adversary would then decide which arms to reduce in an effort to achieve an agreed point reduction. See Russell J. Leng & William Epstein, *Calculating Weapons Reductions*, 41 BULL. OF THE ATOM. SCI. 39-41 (1985), cited in BRAMS & TAYLOR(1), *supra* note 14, at 65 n.3. Stephen Salter proposed a similar procedure in which each superpower would value its own arsenal by distributing 1000 points and then each superpower would dictate which of their adversary's weapons should be eliminated to achieve an agreed upon point reduction. See Stephen H. Salter, *Stopping the Arms Race*, 2 ISSUES IN SCI. & TECH. 74-92 (1986), cited in BRAMS & TAYLOR(1), *supra* note 14, at 65 n.3.

¹⁷⁵ See Liebman, *supra* note 1, at 5. Liebman discusses some of the weaknesses with common negotiation techniques. She notes that adversarial negotiation is the most common style of bargaining, but it operates as a zero-sum game. See *id.* A zero-sum game assumes that both parties value the object of the negotiation equally and treats a gain for one party as an equal loss for the other party. This view leads parties and attorneys to attempt to negotiate better than their adversary, rather than focusing on reaching an amicable agreement. The problem with this theory is that "divorce is not a zero-sum game." *Id.* at 7. Fisher & Ury developed an alternative to adversarial negotiation which they call principled negotiation. See FISHER & URY, *supra* note 33, at vii. The four rules of principled negotiation are: separate the people from the problem, focus on interests, develop a variety of solutions, and judge results objectively. See *id.* at 11. When parties are aware of how they value items in a negotiation, they will be better prepared to bargain, thereby increasing their ability to reach settlement. See *id.* at 42 ("The basic problem in a negotiation lies not in conflicting positions, but in the conflict between each side's needs, desires, concerns, and fears.").

¹⁷⁶ See BRAMS & TAYLOR(2), *supra* note 15, at 71. Brams and Taylor explain: Preferences are usually private information, and we cannot expect people to honestly reveal them unless it is in their interest to do so. The challenge, therefore is to design procedures that induce the claimants to reveal enough information about their preferences so that an equitable and efficient solution can be implemented.

Id. (quoting H. PEYTON YOUNG, EQUITY IN THEORY AND PRACTICE 130 (1994)).

¹⁷⁷ See *supra*, Part II.

To illustrate how the procedure works, let us assume that a hypothetical couple, Jack and Jill, are seeking a divorce. For simplicity, let us also assume Jack and Jill have no children. The following assets and liabilities must be distributed between them: the marital residence, a boat, two antique rocking chairs, a Picasso original, a full set of china, a 1999 Honda, a 1974 Gremlin, and a \$10,000 joint credit card debt. The first step in the procedure is for each party to distribute 100 points among the various items to reflect the individual's preference for receiving that particular item.¹⁷⁸ Conversely, the point allocation for the credit card debt represents the person's preference to not be liable for that debt. Table 1 reflects the point assignments in this example:

Jill	Jack
House – <u>55</u>	House – 45
Boat – 5	Boat – <u>10</u>
Chairs – <u>8</u>	Chairs – 2
Picasso – 5	Picasso – <u>15</u>
China – 1	China – 1
Honda – <u>18</u>	Honda – 15
Gremlin – 1	Gremlin – <u>4</u>
Debt – 7	Debt – <u>8</u>

Table 1. Jack's and Jill's initial point assignments. A box means that person valued the item higher than the other party.

¹⁷⁸ See *supra* note 172 and accompanying text.

Initially, each party is granted any item to which they assigned a higher point value than the other party.¹⁷⁹ In this example, that means that Jack initially receives the Picasso, the boat, the Gremlin, and release from the credit card debt for a point total of thirty-seven.¹⁸⁰ Jill receives the marital home, the antique rocking chairs, the full credit card debt, and the Honda for a point total of eighty-one.¹⁸¹ Any items the parties valued equally are initially granted to the party with lower points, which in this example is Jack.¹⁸² Therefore, he receives the china increasing his point total to thirty-eight.¹⁸³ All the listed items have been distributed, so the initial phase of the algorithm is complete. At this point, the parties begin the adjustments.¹⁸⁴

The adjustments phase is intended to equalize the parties' point totals. When point totals are equalized, the distribution has been optimized for: (1) efficiency, because the allocations maximize utility of the goods;¹⁸⁵ (2) equitability, because both parties receive the same subjective value;¹⁸⁶ and (3) envy-freeness because neither party would trade their portion for the other parties' portion.¹⁸⁷ Point totals are adjusted by transferring property, which was assigned in the

¹⁷⁹ See BRAMS & TAYLOR(1), *supra* note 14, at 70; BRAMS & TAYLOR(2), *supra* note 15, at 72; Brams & Taylor, *supra* note 18, at 192-93.

¹⁸⁰ The Picasso = 15, the boat = 10, the Gremlin = 4, and freedom from debt = 8. $15 + 10 + 4 + 8 = 37$.

¹⁸¹ The house = 55, the rocking chairs = 8, and the Honda = 18. $55 + 8 + 18 = 81$.

¹⁸² In THE WIN-WIN SOLUTION, Brams and Taylor award tied items to the initial loser. See BRAMS & TAYLOR(2), *supra* note 15, at 75. In FAIR DIVISION: FROM CAKE-CUTTING TO DISPUTE RESOLUTION, they award tied items to the initial winner. See BRAMS & TAYLOR(1), *supra* note 14, at 69. Who receives the item does not matter, because as we will soon see, an item valued equally by both parties will be the first to be transferred in the adjustment phase.

¹⁸³ Previous point total of 37, plus one point from the china set equals 38.

¹⁸⁴ See BRAMS & TAYLOR(1), *supra* note 14, at 69; BRAMS & TAYLOR(2), *supra* note 15, at 72; Brams & Taylor, *supra* note 18, at 193.

¹⁸⁵ See Brams & Taylor, *supra* note 18, at 192 ("Both parties cannot benefit by the swap of items—if one party does better, the other must do worse.").

¹⁸⁶ See *id.* ("The equitability adjustment, which gives each player [equal points] . . . may be interpreted as providing each player with what he or she perceives to be [an equal portion of the goods].")

¹⁸⁷ See *id.* at 191 ("Neither party will envy the items the other party receives because [he or she] will think the [combined] value of [his or her] items is more than 50 percent of the total.").

initial phase of the procedure, from one individual to another.¹⁸⁸ When an item is transferred, the point total of the person losing the item is reduced by his or her point assignment for that item.¹⁸⁹ Likewise, the point total of the person receiving the item is increased by his or her point assignment for that item.¹⁹⁰ Transfers of property affect the spouses' point totals unequally because the spouses value the transfer differently.¹⁹¹

Before making adjustments, the point ratios of each item must be calculated with the formula: $R = P_w / P_l$, where R is the point ratio, P_w is the point assignment of the initial winner, and P_l is the point assignment of the initial loser.¹⁹² The point ratios for the property in the Jack and Jill example are set forth in Table 2:

Item of Property	Point Ratio
House	1.22
Boat	-----
Chairs	4
Picasso	-----
China	-----
Honda	1.2
Gremlin	-----
Debt	-----

Table 2 shows the point ratios for the items that may be transferred from the winner of the initial phase, Jill, to the loser, Jack.

All transfers must observe two rules. First, an item with a lower point ratio is always transferred before any item with a higher point ratio.¹⁹³ Second, if transferring an item will result in the loser acquiring more points than the winner, the

¹⁸⁸ See *id.* at 193.

¹⁸⁹ See, e.g., *id.*

¹⁹⁰ See, e.g., Brams & Taylor, *supra* note 18, at 193.

¹⁹¹ See, e.g., *id.*

¹⁹² See BRAMS & TAYLOR(2), *supra* note 15, at 73.

¹⁹³ This transfer order ensures efficiency because the items with the lowest ratio item will give the loser the most points while taking the fewest points away from the winner. See BRAMS & TAYLOR(1), *supra* note 14, at 69.

item is not transferred in full; it must be apportioned between the two parties.¹⁹⁴ The proportionality of the split is determined using the following equation:¹⁹⁵ $P = \frac{D_p}{T}$, where P represents the percentage of the item to be transferred, D_p represents the difference in total points between the parties,¹⁹⁶ and T represents the sum of the two parties' point assignments for the item to be transferred.¹⁹⁷

For Jack and Jill, the first item to be transferred to Jack is the Honda, with a point ratio of 1.2.¹⁹⁸ After the transfer, Jill has sixty-three points and Jack has fifty-two points, so another item must be transferred.¹⁹⁹ The next item to be transferred is the house, with a point ratio of 1.22.²⁰⁰ If the house was transferred entirely, Jill would have only eight points, while Jack would have ninety-nine. This transfer gives Jack more points than Jill, violating the second transfer rule. To equalize the point totals without violating any rules, only a portion of the house can be transferred.²⁰¹ According to the procedure, only 11% of the house must be transferred.²⁰² To transfer 11% of the house, the house must be sold and the sale proceeds divided. This partial transfer gives Jill 89% of her initial valuation or 48.9 points and Jack 11% of his initial valuation or 4.9 points.²⁰³ Both parties now have equal point totals of 58.4.²⁰⁴ With the parties' point totals equalized, the property distribution is complete.²⁰⁵

¹⁹⁴ Some items may be easily divisible for apportionment, such as a bank account. When an item is not divisible, such as a house, it must be sold so the proceeds can be distributed proportionally. Another solution would be for one party to buy the other party's proportion. See BRAMS & TAYLOR(2), *supra* note 15, at 77.

¹⁹⁵ See *id.* at 74.

¹⁹⁶ $D_p = P_w - P_l$, where P_w represents the current point total of the winner, and P_l represents the current point total of the loser.

¹⁹⁷ $T = T_w + T_l$, where T_w represents the point assignment of the initial winner, and T_l represents the point assignment of the initial loser.

¹⁹⁸ Ratio = $18/15 = 1.2$.

¹⁹⁹ Jill's point total = $81 - 18 = 63$. Jack's point total = $37 + 15 = 52$.

²⁰⁰ Ratio = $55/45 = 1.22$.

²⁰¹ See, e.g., BRAMS & TAYLOR(2), *supra* note 15, at 73-74.

²⁰² Transfer percentage = $D_p/T = (63-52)/100 = 0.11 = 11\%$. See, e.g., BRAMS & TAYLOR(2), *supra* note 15, at 73-74.

²⁰³ See *id.*

²⁰⁴ Jill had 10 points without the house. Adding 88% of her house valuation, 48.4 points, gives her 58.4 points. Jack had 53 points without his portion of the house. Adding 12% of his house valuation, 5.4 points, gives him 58.4 points.

²⁰⁵ "Both people get exactly the same number of points, based on their own

C. *Weighted Distribution*

This procedure can also be adapted to favor one party over the other.²⁰⁶ For instance, if the parties, the court, or the state decides that the wife should receive 60% of the marital assets, this can be built into the calculations. In our previous example, if it was decided that Jill should receive 60% of the assets, then transfers during the adjustment phase would be made until the Jack's point total was 60% of Jill's point total, rather than adjusting until their point totals are equal.²⁰⁷ After each adjustment, the ratio would be calculated to determine if more adjustments are necessary. When the point totals require that an asset or liability be transferred in part, the following formula can be solved for X: $P_w - T_wX = R(P_L - T_LX)$, where X represents the percentage to be transferred, P_w and P_L represent the point totals of the winner and loser respectively, T_w and T_L represent the points for the item to be transferred as assigned by the winner and loser respectively, and R represents the desired ratio between the parties' point totals.²⁰⁸

IV. DOES ADJUSTED WINNER WORK AS CLAIMED?

Adjusted Winner makes some necessary assumptions, which may not be true for all divorcing couples.²⁰⁹ Hence, Adjusted Winner will facilitate the division of marital assets for some couples, but it may be too simplistic for other couples. First this Part will analyze Adjusted Winner's weakness. Then Adjusted Winner will be analyzed to determine how it will impact the existing divorce bargaining problems previously discussed in Part II.²¹⁰

valuations of the different items." BRAMS & TAYLOR(2), *supra* note 15, at 74.

²⁰⁶ See BRAMS & TAYLOR(2), *supra* note 15, at 76.

²⁰⁷ If Jill receives 60%, then Jack receives the remaining 40%. The ratio between their two portions is $40/60 = 2/3 = 60\%$. Mathematically this division can be represented by the equation: Jack = Jill \div 2/3, or Jack = Jill*60%.

²⁰⁸ See *id.* This same formula was used in the preceding example, but in a simplified form.

²⁰⁹ See Jolls et al., *supra* note 66, at 1471 ("Economic analysis of law usually proceeds under the assumptions of neoclassical economics. But empirical evidence gives much reason to doubt these assumptions.").

²¹⁰ See *supra* Part II.

A. Weaknesses

Adjusted Winner translates human preferences into numbers, then applies a mathematical algorithm to distribute the property, maximizing each party's points.²¹¹ Translating human thoughts and desires into numbers requires some assumptions to be made. First, Adjusted Winner assumes an individual's desire for an item of property is independent from their desire for all other items.²¹² In reality, an individual's preferences may be linked, such that he or she wishes to receive certain items together or to receive neither item.²¹³ The second assumption Adjusted Winner makes is in the adjustment phase. If the final adjustment requires a proportional distribution, the procedure assumes that the declared preferences for the particular item are equal to the parties' preferences for receiving the money equivalent of the item.²¹⁴ In some instances, a person's valuation for a particular item will be based purely on the item's fair market value; other times, a person's valuation may be based on emotions. Finally, Adjusted Winner assumes every dispute can be resolved in only three ways: (1) the wife receives the property, (2) the husband receives the property, or (3) they split the property based on a mathematical formula.²¹⁵ For divorce issues like alimony, child

²¹¹ See *supra* Part III.

²¹² See BRAMS & TAYLOR(1), *supra* note 14, at 72 ("[The equalization] of the players' [points] assumes that points (or utilities) are additive and linear. . . . Additivity here means that the value of two or more goods to a player is equal to the sum of their points. . . . Neither assumption is necessarily a good reflection of players' preferences.").

²¹³ See BRAMS & TAYLOR(1), *supra* note 14, at 72 ("Thus, goods may not be 'separable' because of complementarities—that is, obtaining one good may affect the value one obtains from others.").

²¹⁴ Brams and Taylor suggest three methods to execute a proportional transfer. First, the item can be sold and the proceeds distributed proportionally. See BRAMS & TAYLOR(2), *supra* note 15, at 77. Second, one party can purchase the other party's portion, so the item can be transferred whole. See *id.* Third, a mediator can tell the parties the item to be transferred and the proportion to transfer without revealing who won the larger portion. See BRAMS & TAYLOR(1), *supra* note 14, at 100-01. The parties can then negotiate to determine what it means to win the separate shares. See *id.* The third solution is undesirable because it will introduce all the problems that exist in the current divorce bargaining situations, completely obfuscating any benefit from Adjusted Winner.

²¹⁵ See, e.g., Brams & Taylor, *supra* note 18, at 194-96 (applying Adjusted Winner to a hypothetical divorce settlement).

custody, and child support, there are a myriad of possible resolutions. It would be a disservice to parents and children to allow custody to be determined based solely on mathematical formulas.

1. Relationship Between Assets

Adjusted Winner assumes that the goods to be distributed are completely separable.²¹⁶ In other words, the procedure assumes that an individual's personal preference for a particular item is completely independent from that person's preference for any other item.²¹⁷ This assumption is often incorrect. For example, in the Jack and Jill example, Jill's point allocation for the rocking chairs may depend on who ultimately receives the house. If she receives the house her preference for the rocking chairs may increase compared to the situation in which Jack receives the house.²¹⁸ This relationship between items is lost in Adjusted Winner because participants are forced to declare their preferences without knowing which items they will receive and which items they will not receive. If Jill does not receive the house, some or all of the points she allocated to the rocking chairs may be misallocated, distorting all of her point allocations.²¹⁹ This could lead to a mathematically equitable solution that does not accurately reflect the real-life solution.

Brams and Taylor recognize this weakness and offer a possible method to resolve it.²²⁰ They suggest grouping together items that are related so the parties can assign one point value to the entire group. For instance, rather than list the house and the rocking chairs separately, Jack and Jill could list one item, the house with the rocking chairs. With this grouping,

²¹⁶ See BRAMS & TAYLOR(1), *supra* note 14, at 72.

²¹⁷ See *id.* (recognizing that Adjusted Winner will only provide an equitable distribution if the utility a person receives from two items is equal to the utility that a person would receive from each item separately).

²¹⁸ See *id.* ("goods may not be 'separable' because of complementarities [sic]—that is, obtaining one good may affect the value one obtains from others").

²¹⁹ See *id.* (requiring "separability" [sic] of items to achieve equitability in the result).

²²⁰ See *id.* at 97 (suggesting that players "lump nonseparable [sic] issues together").

Jill would be able to assign a point value to the pair of items that accurately reflects her true preference.²²¹

This modification increases the transaction costs of the process because participants must determine how items should be grouped together prior to assigning their point allocations.²²² In some situations, groupings may be intuitive, like pairing the house with its mortgage or the car with its lease. In other situations, the parties may not be able to agree on how to group items together, causing a bargaining breakdown almost immediately. For this reason, some divorcing couples may be better off utilizing a more flexible method of bargaining, such as mediation or attorney represented negotiations. If it is not apparent whether a particular couple will be able to use Adjusted Winner, it should still be tried. In the event the procedure fails to produce an acceptable result, little time or energy will have been lost. If the procedure does work, it can quickly lead the party to an equitable and efficient result.²²³

2. Preference for Ownership Compared to Preference for Fair Market Value

Adjusted Winner forces the parties to translate their subjective preference for an item into a numerical value. If the final adjustment requires a proportional transfer of a non-divisible item, then a second translation occurs. The initial point allocation representing the parties' preference to receive the actual item is translated into a point allocation representing the parties' preference to receive that same item's market value. For instance, in the Jack and Jill example, the house must be sold to effectuate the final proportional transfer. Jill's initial point assignment of fifty-five represented her preference for receiving the actual house. In the end, Jill receives money, but Adjusted Winner adjusts her point total as

²²¹ See BRAMS & TAYLOR(1), *supra* note 14, at 97.

²²² See *id.* at 98 ("We conclude . . . that two players, in order to maximize their point totals under A[djusted] W[inner] . . . would be well advised to apply [this] procedure to as many different issues as they can reasonably make separable and additive.").

²²³ See *infra*, Part IV.B., for a discussion of Adjusted Winner's strengths.

if she received a portion of the actual house. She receives one item of property, but is treated as if she received a different item. In other words, the mathematics of Adjusted Winner may no longer represent reality.

This distortion is caused by Adjusted Winner's inability to account for human emotion. A person will include many factors in his or her decision when determining the initial point allocations. These factors may include both emotional and economic aspects of ownership.²²⁴ For example, Jill may have a sentimental attachment to the house because her children grew up there. If the house is to be sold, rather than granted to her, she may have assigned it a lower point value.²²⁵ By lowering her valuation for the house she would have had additional points to allocate to another item, such as the Honda. Because the point allocations are declared before the ultimate result is known, the initial declarations may not be accurate when the procedure is complete.

Alternatively, the couple could negotiate after the procedure has been completed.²²⁶ In this scenario, when a non-divisible item must be divided in the adjustment phase, rather than liquidating the asset, the parties receive an interest in that item. These interests can then be exchanged freely between the couple, resulting in complete ownership by one spouse.²²⁷ While this may solve the problem of non-divisibility, it introduces the need for traditional bargaining. Introducing traditional bargaining into the process will introduce power imbalances and coercion, negating some of the benefits of Adjusted Winner.²²⁸ To preserve the benefits of Adjusted

²²⁴ See Richard D. Schepp, Comment, *A Call for Recognition of Owners' Subjective Valuations in Residential Construction Defect Cases*, 1989 WIS. L. REV. 1139, 1155 (1989) ("the subjective value attached to a good or service is rarely, if ever, the same as the market value of that good or service.").

²²⁵ See *id.* at 1552 (suggesting that use of subjective valuations to determine damages in residential construction contract cases would "recognize the personal nature of a home's aesthetics").

²²⁶ See BRAMS & TAYLOR(1), *supra* note 14, at 100-01 (suggesting that in the event of a proportional transfer of a non-divisible item, such as a house, that the proportions won by each party should be kept secret until the "parties are able to hammer out an agreement on what winning [each] proportion [sic] means").

²²⁷ See generally Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

²²⁸ See *supra* Part III; *infra* Part IV.B; see also BRAMS & TAYLOR(1), *supra* note

Winner without generating absurd results, it should not be applied if: (1) most of the property to be divided is not easily divisible, or (2) when the parties cannot agree that receiving the fair market value of a particular item would be satisfactory.²²⁹

3. Unsuitable Issues

Adjusted Winner works best with issues that can be resolved with an all-or-nothing approach and can be easily divided in the event of a proportional transfer. However, not all divorce issues can be resolved this simply. Child custody, for example, is rarely resolved with an all-or-nothing approach.²³⁰ Usually the parents share custody through some formal agreement they developed and the court approved.²³¹ Because a child is involved, rather than an inanimate material object, it is beneficial for the parents to have increased control and flexibility when negotiating the custody arrangement.²³² This

14, at 101 (failing to mention the potential for strategic behavior when the parties negotiate for transfer of partial interests in property resulting from proportional transfer during adjustment phase of Adjusted Winner).

²²⁹ These situations may arise when there are few items to distribute or the items are mostly liquid accounts. For example, Adjusted Winner would work better for a couple who has cash savings accounts and some investments, but do not own any real estate, than for a couple who have invested primarily in their own home.

²³⁰ See MACCOBY & MNOOKIN, *supra* note 25, at 72 ("When couples with children separate, they face a period of months or even years during which the terms of their legal divorce will be worked out and a custody decree issued.").

²³¹ Maccoby and Mnookin found that 90% of custody agreements in their California study resulted in the mother receiving sole physical custody, while legal custody was shared between the parents. *See id.* at 112. Maccoby and Mnookin also found that in "fewer than one-quarter of the cases was there actually a conflict between parental requests for custody." *Id.* at 100; *see also* Mnookin & Kornhauser, *supra* note 9 at 955 ("Private agreements concerning [child custody] matters are possible and common, but agreements cannot bind the court On the other hand, available evidence on how the legal system processes undisputed divorce cases involving minor children suggests that parents actually have broad powers to make their own deals.").

²³² *See* Mnookin & Kornhauser *supra* note 9 at 958 ("A child's future relationship with each of his parents is better ensured and his existing relationship less damaged by a negotiated settlement than by a court after an adversary proceeding. . . . Second, the parents will know more about the child than will the judge, since they have better access to information about the child's circumstances and desires.").

allows all the possible variables, such as residence, schooling, medical care, and religious affiliation, to be properly considered.²³³

If Adjusted Winner was applied to resolve a custody issue, the parents would have to predetermine what it means to "win" or "lose" the custody issue. Furthermore, they must decide how to resolve the issue in the event a proportional transfer must be made. To apply Adjusted Winner to custody disputes, Brams and Taylor suggest that winning the custody issue could mean an award of sole custody.²³⁴ In the event of a proportional transfer of custody rights, Brams and Taylor suggest the winner of the larger portion should receive primary custody while the winner of the smaller portion receives visitation rights.²³⁵ Before the parties are told who has won primary custody, Brams and Taylor suggest that they negotiate to determine what the visitation rights will be.²³⁶

This suggested approach to child custody limits the couple's flexibility and will not be practical. Brams and Taylor's approach requires the party to initially limit themselves to only two choices, representing "winning" and "losing" the child custody issue. This approach is too restrictive and fails to include all the factors necessary to fully explain the custody arrangement.²³⁷ "The parental divorce is especially complex in

²³³ See *id.* at 957 ("who can better evaluate the comparative advantages of alternative arrangements than the parties themselves").

²³⁴ See Brams & Taylor, *supra* note 18, at 196-97.

²³⁵ See BRAMS & TAYLOR(2), *supra* note 15, at 117 ("The relative winner will get primary custody, and the relative loser will have visitation rights.").

²³⁶ See *id.* ("the two sides are more likely to reach a settlement if they do not know which side they will end up on").

²³⁷ See MACCOBY & MNOOKIN, *supra* note 25, at 37. Maccohy and Mnookin explain:

In some families, divorce means that one parent essentially drops out of the parental role In other families, both parents continue to be involved, and for these families important new issues emerge: What kind of agreement can the parents come to concerning the amount of time the children will spend with each parent? How will they divide responsibilities for getting the children back and forth? Should they operate independently, or should they try to achieve some form of coordination between the two households with respect to standards of behavior set for the children, discipline, chores, allowances, privileges, and so forth? When important decisions need to be made concerning the child's life . . . should the parents plan to discuss each issue and decide jointly? What decisions should be left to the independent decision-making of whichever parent has the child with him/her [sic]

cases of joint custody.²³⁸ Application of Adjusted Winner will greatly oversimplify the complexity of child custody and is not the best method to construct a shared custody agreement.

Similarly, Adjusted Winner may greatly oversimplify child support and alimony awards. Because the custody agreement will affect the need for child support, child support should be resolved in conjunction with the custody arrangement.²³⁹ Courts and divorcing couples consider many factors when determining child support and alimony obligations.²⁴⁰ Adjusted Winner cannot properly include all the relevant factors to calculate an appropriate child support or alimony award.²⁴¹

For divorcing couples with no children, this weakness of Adjusted Winner will not be a problem. For couples with children, Adjusted Winner will still be effective to resolve the division of marital assets when the child custody and support agreements are complete. For couples considering only alimony, Adjusted Winner should first be applied to divide all the marital assets because the property distribution will ultimately affect a party's need for or ability to pay alimony.²⁴²

at the time?

Id.

²³⁸ *Id.* at 38.

²³⁹ See MACCOBY & MNOOKIN, *supra* note 25, at 116 ("The likelihood of a child support award, however, varied with which parent was awarded physical custody (or whether the couple were awarded joint custody).").

²⁴⁰ See *id.* at 123 (finding certain factors relevant to determining child support awards, but also finding "nearly half of the variation in award size remains unexplained suggest[ing] that discretion may play a substantial role in child support determination"); *id.* at 123-24 (finding multiple factors relevant to alimony award, such as duration of marriage, mother's age, home ownership, divorce initiator, education level of the father, and age of the youngest child); see also Garrison(2), *supra* note 42, at 699-711.

²⁴¹ But see Brams & Taylor, *supra* note 18, at 195 (applying Adjusted Winner to determine property division, alimony, and child custody). Brams and Taylor do not discuss what to do in the event alimony rights need to be apportioned between the party. See *id.*

²⁴² See Garrison(2), *supra* note 42, at 627-28 ("As time went by, some courts began to employ property distribution for broader remedial purposes and gave a wife property that she had not brought into the marriage to make up for a husband's inability or unwillingness to pay adequate alimony."); see also *id.* at 693 (suggesting that "tradeoffs in property for alimony, and vice versa, occurred more frequently under the new [equitable distribution laws]").

Adjusted Winner could be modified to include alimony in certain cases, but some preliminaries would be necessary. Before including alimony in Adjusted Winner, the parties must determine who will pay alimony if any should be awarded, what

B. *Strengths*

As discussed in Part II, current divorce procedures do not effectively prevent unfair agreements caused by the disparity between the parties' ability to bear the transaction costs of divorce. The effect of power imbalance may be reduced by lowering the transaction costs of private bargaining which Adjusted Winner accomplishes by easily, quickly, and simultaneously distributing all property.²⁴³ Power imbalances can also be reduced by limiting activities which increase the transaction costs such as emotional decision making, strategic behavior, and excessive lawyering. Adjusted Winner does not prevent strategic behavior, but does encourage and reward honesty.²⁴⁴ Likewise, the procedure does not prohibit emotional decision making, but parties are forced to recognize the consequences of emotional actions.²⁴⁵ Adjusted Winner limits excessive lawyering because unlike traditional bargaining the lawyer's primary role is not as a negotiator, but rather as a counselor and financial advisor.²⁴⁶ Uncertainty of entitlements will not raise the transaction costs of applying Adjusted Winner, which generates a property distribution irrespective of the statutory entitlements. Additionally, Adjusted Winner generates a property division based on the individuals'

amount will be paid, and for what duration alimony will be required. *See* Brams & Taylor, *supra* note 18, at 194. If the parties agree that the husband will pay alimony to the wife, this right can be added to the list of items to be distributed. *See id.* The husband will assign a point value to release him from any alimony obligation, and the wife will assign a point value to the right to receive alimony. *See id.* Adjusted Winner can then be used to simultaneously resolve, with exception of child support, all the financial issues in divorce.

²⁴³ *See* BRAMS & TAYLOR(2), *supra* note 15, at 116 ("[Adjusted Winner] could provide many divorcing couples with rapid closure of their often endless haggling over money [and] physical property.").

²⁴⁴ *See id.* at 83 ("sincerity [is] a guarantee strategy under A[adjusted] W[inner]: No matter what strategy an opponent chooses, sincerity guarantees an envy-free portion to the sincere party").

²⁴⁵ *See id.* at 117 ("the assignment of points to items will weaken one's desire to spite the other person, because to do so would be to give up points on something one may value more").

²⁴⁶ *See* Brams & Taylor, *supra* note 18, at 203 ("lawyers as well as mediators can play a valuable role in [Adjusted Winner] [] by helping their clients make their point assignments in a way that reflects their honest estimates of worth. . . . Lawyers and mediators can also assist the parties in predicting possible outcomes . . . and running through various scenarios they might face.").

preferences, maximizing the economic utility of the marital assets after divorce.²⁴⁷ Thus, Adjusted Winner will reduce power imbalances in divorce bargaining, increasing the likelihood of achieving a fair result.

1. Reducing Transaction Costs

Two qualities of Adjusted Winner should work to lower the total transaction costs of the bargaining process. The procedure is simple to apply and it focuses the divorcing couple on the division of property, avoiding unrelated conflicts. Together, these two qualities of Adjusted Winner will significantly facilitate the process, lowering the overall financial and emotional costs, and facilitate a quick resolution.

Traditional divorce bargaining requires the parties to determine their positions, propose a resolution, analyze where their opposing positions conflict, and then resolve conflicts one by one.²⁴⁸ Determining one's position involves an analysis of his or her preference for different resolutions, preference for risk, and ability to bear transaction costs. Parties employing Adjusted Winner need only determine their resolution preferences, not their complete positions. Simplifying the preparatory work should speed up the whole process and lower the transaction costs.

Because Adjusted Winner rapidly generates a property distribution, there is a heavier emotional cost on the preparatory work.²⁴⁹ An unfavorable result is due solely to the parties' declared preferences, not the procedure.²⁵⁰ Shifting the emotional burden away from the negotiation session should prevent the couple from developing new negative feelings toward each other or amplifying any existing ones.²⁵¹ This

²⁴⁷ See BRAMS & TAYLOR(2), *supra* note 15, at 74 ("Subjectively speaking, [] each person does as well as the other, assuming their point valuations are honest reflections of their desires for the different items.").

²⁴⁸ See Gitlin, *supra* note 60, at 111-26 (describing various stages in negotiating property division at divorce).

²⁴⁹ See Brams & Taylor, *supra* note 18, at 203 (recognizing the increased role of mediators and attorneys in determining the parties' preferences and understanding the potential outcomes).

²⁵⁰ Accord Liebman, *supra* note 1, at 19 (recognizing the risk of different negotiation styles).

²⁵¹ See *id.* at 23 (recognizing the long term benefits of cooperative negotiation,

should reduce the overall emotional cost of the process, speeding up the parties' return to more productive activities and leading to cooperation in the future.²⁵²

Adjusted Winner may oversimplify a spouse's subjective value for a particular asset because the valuation either depends on receipt of another asset, or the procedure distributes the asset based on fair market value. If oversimplification occurs the distribution generated may not be accepted by one or both parties. If the solution generated is not acceptable, the parties will be forced to begin traditional negotiations or look to the court to determine the division. By providing the couple with a starting point, based on their declared preferences, for further negotiations, Adjusted Winner will still facilitate any further bargaining. For example, strategic behavior will be much less effective if both spouses are aware of the other spouse's true preferences. Similarly, if the court must resolve the conflict, a clear declaration of preferences will greatly assist the court in reaching a result tailored to the couple's desires. The court can distribute the property following Adjusted Winner and make modifications necessary to guarantee equitability. Without this information, negotiation and court proceedings require a period of information gathering, demanding time and energy.²⁵³ So, even in failure, the Adjusted Winner procedure has potential to reduce the emotional and financial costs of divorce.²⁵⁴

because the divorcing couple will likely need to resolve future conflicts alone).

²⁵² See *id.*; Mnookin & Kornhauser, *supra* note 9, at 956 ("Given the substantial delays that often characterize contested judicial proceedings, agreement can often save time and allow each spouse to proceed with his or her life."); Leatherberry, *supra* note 48, at 25 ("ill-feelings between the parties very likely will continue for a long time"); see also BRAMS & TAYLOR(1), *supra* note 14, at 113-14 ("Since the settlement is not the product of protracted negotiations or court battles, it is likely to lead to a more satisfying and durable outcome and foster more civil future relations between the parties").

²⁵³ See Skoloff, *supra* note 33, at 38 ("It is absolutely essential that the attorney fully understand the circumstances of the litigation before commencing negotiations with the other side."); see generally Garrison(1), *supra* note 1 (recognizing the multiple factors judges use to determine an equitable distribution of property).

²⁵⁴ See MACCOBY & MNOOKIN, *supra* note 25, at 55 ("[D]ivorcing couples may gain substantial advantages when they can reach an agreement concerning the distributional consequences of divorce. They can minimize the transaction costs involved in adjudication; they can also avoid its risks and uncertainties, and negotiate an agreement that may better reflect their individual preferences.").

2. Emotional Decision Making

Adjusted Winner does not provide any direct incentives for parties to avoid emotional decision making. By focusing the distribution on subjective valuations, Adjusted Winner actually makes emotions a more important factor in the distribution. By providing the spouses with a limited number of points with which to value the assets, the procedure forces them to recognize the consequences of their actions and the limitations of the distribution.²⁵⁵ Simply stated, points allocated to one item cannot be allocated to another, forcing a participant to choose. For example, if Jack assigned the marital home a high point value merely to deprive Jill, he will have fewer points to assign to other assets he truly desires, like the boat. Adjusted Winner forces him to decide what is more important, receiving the boat or depriving his wife. Weighing the utility of one result against the utility of another is rational decision making.²⁵⁶ This does not preclude emotional decisions; if a participant desires revenge more than possessing particular assets, choosing revenge would be a rational choice.²⁵⁷

Increasing rational decision making should limit conflicts because parties will likely recognize the need for compromise.²⁵⁸ When parties negotiate with an understanding

²⁵⁵ See BRAMS & TAYLOR(2), *supra* note 15, at 117 ("Thus, the assignment of points to items . . . to spite the other person, . . . would be to give up points on something one may value more.").

²⁵⁶ See Posner, *supra* note 68, at 1551 (defining rationality as "choosing the best means to the chooser's ends."). Judge Posner provides an example:

[A] rational person who wants to keep warm will compare the alternative means known to him of keeping warm in terms of cost, comfort, and other dimensions of utility and disutility, and will choose from this array the means that achieves warmth with the greatest margin of benefit over cost, broadly defined.

Id.

²⁵⁷ See *id.*

²⁵⁸ See Ginsburg, *supra* note 125, at 72. Judge Ginsburg explains: Another important task is the setting of realistic expectations. Parties look to the divorce process to meet needs that the system cannot meet. . . . When the client is finally forced to face the reality that, in most cases, the court system or any other system can only make an equitable division of an inadequate amount of money.

Id.; see also Leatherberry, *supra* note 48, at 26 (recognizing the risk if one party makes unreasonable demands).

of compromise and balance, a resolution will be easier to reach, lowering the transaction costs.²⁵⁹ Compromise and balance are the cornerstones of Adjusted Winner. While a participant may win every asset he or she values more than the other party, he or she will lose every asset valued less. Adjusted Winner does not rely on the parties to compromise. Rather, it is built into the system.²⁶⁰

3. Strategic Behavior

Adjusted Winner effectively discourages strategic behavior in three ways. First, the procedure relies heavily on personal preferences. Thus, declaring false preferences will only reduce a person's chance of receiving what he or she truly desires. Second, the procedure creates significant hurdles to succeeding with strategic behavior. Third, power imbalances creating opportunities for strategic behavior are avoided because Adjusted Winner disregards statutory entitlements. By reducing strategic behavior, Adjusted Winner increases the probability of a fair result.²⁶¹

While Adjusted Winner can be manipulated by one party through strategic behavior, if both parties act strategically neither party will be better off.²⁶² This can be illustrated with the following example.²⁶³ Let us assume Jack and Jill must divide only two items, the house and the boat. Let us also assume Jack is fully aware of Jill's point assignments of eighty-five for the house and fifteen for the boat, before they are declared. Jack's true valuations for these items (house and boat) are fifteen and eighty-five, respectively. Rather than declare his true valuations, Jack attempts to maximize his portion of the division by declaring that his

²⁵⁹ See FISHER & URY, *supra* note 33, at 73 (suggesting negotiating parties should invent solutions for mutual gain, rather than assuming the negotiation is to divide a "fixed pie").

²⁶⁰ See BRAMS & TAYLOR(2), *supra* note 15, at 79 ("[Equitability] is guaranteed by the equitability adjustment [] and, hence, is built into A[djusted] W[inner] by design.").

²⁶¹ Cf. Mnookin & Kornhauser, *supra* note 9, at 972-73 ("Parties may intentionally exaggerate their chances of winning in court in the hope of persuading the other side to accept less.").

²⁶² See BRAMS & TAYLOR(1), *supra* note 14, at 82.

²⁶³ See *id.*

valuations for the house and boat are sixty and forty, respectively. Compared to his true preferences, these false declarations may result in Jack receiving a larger portion of the marital estate. Table 3 shows the values in this example:

	Jill's Values	Jack's declared values	Jack's true values
House	85	60	15
Boat	15	40	85

Table 3. Jill's truthful point valuations, Jack's strategic valuations, and Jack's true point valuations, attempting to manipulate the procedure.

According to the truthful evaluations, both parties should receive eighty-five total points.²⁶⁴ In this situation, both parties' preferences are perfectly opposite, so no adjustments would be necessary. According to the declared preferences, Jill initially receives eighty-five points, while Jack only receives forty. Jill must transfer some points to Jack to equalize their point values. After the adjustment, both participants have 58.6 points.²⁶⁵ Jack, according to his true valuations, has now received eighty-five points from the boat, plus 4.65 points from proportional transfer of the house, for a total of 89.65 points.²⁶⁶ In this scenario, Jack successfully manipulated the procedure to receive a larger portion of the division than Jill.²⁶⁷

The situation is different when both parties have information regarding the other's valuations.²⁶⁸ For instance, in divorce, the parties will likely have intimate knowledge of each other's likes and dislikes, which can be used to anticipate each other's declared preferences.²⁶⁹ Using the same truthful

²⁶⁴ Jack would receive the boat for 85 points and Jill would receive the house for 85 points.

²⁶⁵ The calculation for the transfer percentage is: $(85-40)/145 = 31\%$. Jack receives 31% of his valuation of 60, or 18.6 for a total of 58.6 points. Jill keeps 69% of her valuation or 58.6 points.

²⁶⁶ Points transferred = $31\% \text{ of } 15 = 4.65$.

²⁶⁷ See, e.g., BRAMS & TAYLOR(2), *supra* note 15, at 79-81.

²⁶⁸ See *id.* at 82.

²⁶⁹ See Liebman, *supra* note 1, at 17 (listing one distinguishing characteristic of divorce bargaining to be that "[t]he parties have a great deal of information about each other").

preferences from the previous example, let us assume that Jack and Jill are fully aware of each other's true preferences and that they both expect the other person to declare his or her preferences truthfully. Jill falsely declares fifty points each for the house and the boat. Jack again falsely declares sixty for the house and forty for the boat. Jack would initially receive the house for a point total of sixty and Jill would receive the boat for a total of fifty. After point adjustments, both parties will end up with only 54.6 points.²⁷⁰ The point totals based on their true valuations paint a very different picture. Jack has received the house for a measly 13.65 points and Jill has received the boat for a meager 22.7.²⁷¹ The strategy backfired terribly with neither party receiving what they desired and the resources being inefficiently utilized.²⁷²

These two examples illustrate that the procedure can be successfully manipulated when only one person has information regarding the other party's declared preferences. When both parties have the same information, attempts at manipulation can result in a much worse situation than if both parties were truthful. These situations illustrate how divorce bargaining through Adjusted Winner is analogous to the prisoner's dilemma. Like the prisoner's dilemma, the strategy which is independent of the other participant's actions is the safest, although not the most profitable. In Adjusted Winner, the strategy which results in the Nash equilibrium²⁷³ is truthfulness.²⁷⁴ When one party behaves strategically, the other

²⁷⁰ The calculation for the transfer percentage is: $(60-50)/110 = 9.09\%$. Jack keeps 89.91% of his points, or 54.5 points. Jill receives 9.09% of her house point assignment, or 4.5 points.

²⁷¹ Jack's true point assignment for the house was 15. He transferred 9.09% to Jill, or 1.36 points. Jill's true point assignment for the boat was 15. She received 9.09% of her point assignment for the house, or 7.73 points.

²⁷² See BRAMS & TAYLOR(2), *supra* note 15, at 82 (describing the situation in which both parties behave strategically as "massively inefficient, but [] also leav[ing] each person extremely envious of the other").

²⁷³ See *supra* note 169 and accompanying text.

²⁷⁴ The following matrix represents the outcomes from the two examples. The strategies along the row represent Jill's choices and the strategies along the column represent Jack's choices. The point totals based on their truthful valuations resulting from the different strategy combinations are represented in the format "Jill's points, Jack's points." The situation where Jill declares false preferences and Jack declares truthful preferences is assumed to exactly mirror the situation where Jill is truthful and Jack is false.

party will do best by being sincere rather than attempting to be similarly strategic. If neither party behaves strategically, both parties will be better off. In this way, the procedure creates an incentive for both parties to avoid false preferences. This incentive is not obvious and it will be the responsibility of the attorneys or mediator to explain this to both parties.²⁷⁵ Once the couple understands the danger of behaving strategically, they can focus on determining their own true valuations rather than wasting energy trying to develop a winning strategy. Ultimately, this will lower the transaction costs and guarantee a fair result.

4. Uncertainty of the Law

Adjusted Winner limits the effect legal entitlements will have in the divorce bargaining process. The procedure generates a property division independent of the relevant law. The law will not affect the result whether the law is vague or favors one spouse over the other since legal entitlements never enter the algorithm.²⁷⁶ Adjusted Winner is shielded from the impact of uncertainty of legal entitlements by focusing solely on the participants' personal preferences.²⁷⁷ In theory, personal preferences will be unaffected by legal entitlements. All that is required for the procedure to succeed is for the parties to be willing to participate and for the law to permit private bargaining.

	Truthful Preferences	False Preferences
Truthful Preferences	85, 85	89.5, 58.6
False Preferences	58.6, 89.5	22.7, 13.65

See also *supra* Figure 2 in Part IV.A.

²⁷⁵ See Brams & Taylor, *supra* note 18, at 203 ("Lawyers and mediators can [] assist the parties in predicting possible outcomes").

²⁷⁶ See *supra* Part IV.B. The only element which affects the results is the parties declared preferences.

²⁷⁷ Cf. Mnookin & Kornhauser, *supra* note 9, at 968 (finding that in traditional bargaining legal entitlements "gives each parent certain bargaining chips—an endowment of sorts"). Adjusted Winner can remove the distribution of marital assets from within the "shadow of the law". *Id.*

5. Excessive Lawyering

Adjusted Winner can reduce the harm of excessive lawyering because the procedure itself provides the solution. Lawyers are not required for Adjusted Winner to function properly. The procedure simply requires an operator who understands how to apply it. This could be a neutral third party, such as a mediator or unrelated attorney, or both attorneys could apply the procedure together.²⁷⁸ Unlike traditional bargaining, attorneys applying Adjusted Winner will not have multiple opportunities to disagree. With less opportunity to disagree, there is less opportunity to increase the transaction costs.

Attorneys or a mediator are still helpful when applying Adjusted Winner.²⁷⁹ Someone will be necessary to explain Adjusted Winner to the parties, help the parties determine their valuations, and understand the consequences of their choices. The couple will also likely need assistance to develop a complete list of assets for division and determine their point allocations. Attorneys could also counsel the individuals on whether the resolution from the procedure should be accepted or rejected. Additionally, in the event Adjusted Winner provides a division which one party cannot accept, attorneys or a mediator will be necessary to assist the couple in resolving the conflict with a different resolution method.

6. Personal Preferences

As previously noted, Adjusted Winner takes full advantage of differences in personal preferences.²⁸⁰ Because the entire procedure is based on the preferences of the parties, issues for which their preferences diverge will immediately be

²⁷⁸ See BRAMS & TAYLOR(2), *supra* note 15, at 192 (suggesting that parties provide their point assignments to a referee or mediator, who will apply the necessary equations).

²⁷⁹ See Brams & Taylor, *supra* note 18, at 203.

²⁸⁰ See BRAMS & TAYLOR(2), *supra* note 15, at 78 ("Efficiency is the hallmark of [Adjusted Winner]—there is no other assignment of items that can give both parties more points.").

separated from the issues for which their preferences collide. This will greatly facilitate a resolution between the spouses. Traditional bargaining provides no formal system to filter out issues that can be easily resolved. Even if Adjusted Winner fails, the information gathered from it will facilitate further negotiations or court proceedings because issues for which the couple's preferences diverge can be quickly separated out and resolved.

CONCLUSION

Private resolution of divorce disputes is more beneficial to courtroom litigation because of the potential for the parties to structure their own divorce settlement.²⁸¹ The current procedures available to privately divide the marital property involve the risk of reaching an unfair agreement because of a power imbalance between the couple. Adjusted Winner will successfully reduce the risk of an unfair property division by preventing power imbalances caused by strategic behavior, legal entitlements, and emotional decision making. Because Adjusted Winner focuses on the couple's preferences for particular assets, the division generated will be economically efficient and subjectively equitable to both parties. The procedure should be included in the bag of tools available to divorce lawyers, mediators, and courts.

Adjusted Winner is not appropriate to resolve all divorce issues. Child custody, child support, and alimony should not be resolved with Adjusted Winner because the procedure cannot properly account for all of the relevant factors. For couples who do not have children and are not considering an alimony award, Adjusted Winner could be effective. For couples with children, Adjusted Winner should be applied only after the couple has separately determined the custody and support agreement. For couples considering an alimony award, Adjusted Winner should be applied before beginning discussions of alimony amount and duration since the property division will affect the alimony award negotiations.

²⁸¹ See Mnookin & Kornhauser, *supra* note 9, at 956.

Adjusted Winner may generate a result that does not accurately reflect the parties' subjective valuations. If the parties cannot separately value individual property items, Adjusted Winner should not be utilized. If only a few items are dependent on each other, they may be grouped together and jointly distributed through Adjusted Winner. Additionally, when an item must be sold for a proportional distribution of the proceeds, the points credited to each party may not reflect the individual's subjective valuation of the percentage of money received. This is a relatively small risk since it is a proportional transfer that only happens to one item. Therefore, Adjusted Winner should not be utilized when the parties' subjective values vary greatly from the fair market values for most of their property.

Jeremy A. Matz